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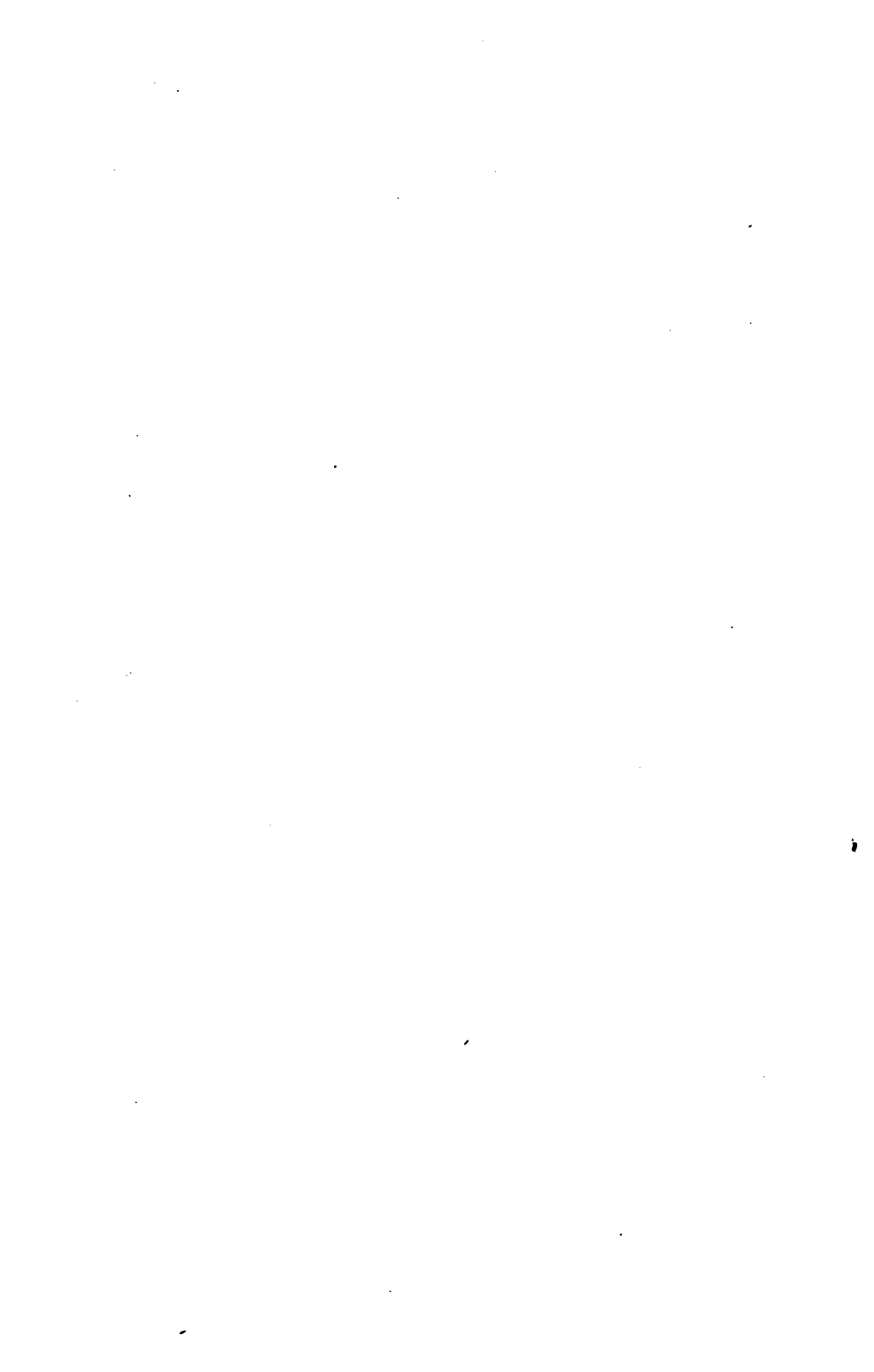


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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN
INDEX, AND NOTES TO THE REPORTED CASES.**

PHILIP ZOERCHER,
OFFICIAL REPORTER
NORMAN E. PATRICK, Assistant Reporter.

0

VOL. 61
CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1915,
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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. JOSEPH G. IBACH.*¶
HON. EDWARD W. FELT.**¶
HON. JAMES J. MORAN.††
HON. MILTON B. HOTTEL.¶
HON. FRED S. CALDWELL.†
HON. JOSEPH H. SHEA.§
HON. JOHN C. McNUTT. §§

*Chief Justice November Term, 1915.

**Presiding Judge at November Term, 1915.

¶Elected in 1910, and reelected in 1914.

§Elected in 1912.

†Appointed September 1, 1913, and elected in 1914.

††Appointed February 10, 1915.

§§Appointed April 28, 1916.

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CASES DECIDED

IN THE

APPELLATE COURT

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1915, IN THE
ONE HUNDREDTH YEAR OF THE STATE.

GOLDBERGER *v.* ARCADIAN WAUKESHA SPRINGS
COMPANY.

[No. 8,818. Filed February 4, 1916.]

1. **APPEAL.**—*Briefs.*—*Sufficiency.*—Where it could be gathered from appellant's brief that certain propositions under points and authorities were directed to alleged error in the admission of certain evidence, the brief was not so defective as to preclude a consideration of the alleged error. p. 2.
2. **EVIDENCE.**—*Written.*—*Parol Evidence to Explain.*—In an action to recover for medicinal water sold pursuant to a written order calling for "136 cs Large Water, price 3.50, 25 cs Large Ginger Ale, price 5.00, 5 casks R. B. pts. Imp. Style ale, price 7.00", etc., parol testimony showing that "cs" meant "cases", that "large water" meant "large water bottles holding one-fifth of a gallon", that "R. B. pts. Imp. Style" meant "round bottom pints imported style", and that the figures in the price column meant price in dollars per case or cask, was properly admitted, since the order was in itself ambiguous. p. 2.

From Allen Circuit Court; *J. W. Eggeman*,
Judge.

Action by the Arcadian Waukesha Springs Company against Morris Goldberger. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Goldberger v. Arcadian, etc., Springs Co.—61 Ind. App. 1.

Vesey & Vesey and Dick M. Vesey, for appellant.
Breen & Morris, for appellee.

CALDWELL, J.—Appellee brought this action against appellant to recover for a bill of medicinal water, etc., sold by the former to the latter, as per a written order, in part as follows:

Order Arcadian Waukesha Springs Co., June 4, '12. Ship to Morris Goldberger, at Ft. Wayne, Indiana. * * *

No. Cases.	Price.
136 cs Large Water.....	3.50
25 cs Large Ginger Ale.....	5.00
5 casks R. B. pts. Imp. Style ale.....	7.00
* * *	(Signed) Morris Goldberger."

A trial by jury resulted in a verdict for appellee for \$670, on which judgment was rendered, from which this appeal is prosecuted. Appellee

1. urges that appellant's brief is so defective that when measured by the rules of this court nothing is presented for our consideration.
2. However, we are able to gather from the brief that appellant has directed certain propositions to the alleged error of the court in hearing parol testimony to elucidate the order. Thus, the court heard such testimony respecting the meaning the parties intended to convey by certain abbreviated words and expressions in the order, and in what sense they are used. Thus, that "cs" means "cases"; that "large water" means "large water bottles holding one fifth of a gallon"; that "R. B. pts. Imp. Style" means "round bottom pints imported style"; that the figures set under the heading "price" mean the price in dollars per case or cask, rather than the price of the entire item.

Appellant more particularly contends that the court erred in hearing such evidence on the subject of price, it being his position that the order in

plain and unambiguous terms specifies the price for the entire item in each instance, and that the court, therefore, in hearing parol testimony that the parties intended the figures quoted to mean the price per case and cask, violated the principle that parol evidence cannot be heard to vary or contradict a plain, unambiguous writing. The parties agree that price in dollars is meant by the figures used.

It will be observed that the order does not in terms specify the price as being for each case or cask or as the total for each item, and also that the aggregate amount of the selling price is not indicated. To arrive at the total, it is conceded that a calculation is necessary. Appellant contends that such calculation should be a mere addition, arriving at \$15.50; while appellee contends that there should be a series of multiplications and an addition, arriving at \$636 as a total. There was other evidence that each case contained fifty bottles and each cask one hundred and twenty bottles, or a total of 8,650 bottles, and that on the return of the empty bottles appellee allowed a credit of from one cent to three cents per bottle. It is thus evident that if appellant is right in his contention, the sale of the goods here was decidedly a losing venture on the part of appellee. Appellant testified as a witness that the water in certain of the cases was defective, and in such condition it was not worth to exceed \$1.75 per case. These observations are made, not that they are important, if the written order is plain and unambiguous, but to indicate that the parties in fact understood the order as interpreted by appellee, and as construed by the court, through the aid of parol testimony. In our judgment, however, the order is incomplete and ambiguous on its face, to the extent that the court properly admitted the parol testimony complained of. *Driscoll v. Penrod*

(1911), 176 Ind. 19, 95 N. E. 313; *Jaqua v. Witham & Anderson Co.* (1886), 106 Ind. 545, 7 N. E. 314; *Barton v. Anderson* (1886), 104 Ind. 578, 4 N. E. 420; *Lake Erie, etc., R. Co. v. Bowker* (1893), 9 Ind. App. 428, 36 N. E. 864; Jones, *Evidence* (2d ed.) §453, *et seq.*

The court did not err in giving instruction No. 9 or in refusing to give No. 6. It may be said in addition that in the motion for a new trial, error is not predicated on the giving of instruction No. 9. Moreover in that department of appellant's brief devoted to "points and authorities", neither of these instructions is mentioned. The most that can be said is that in such department there is a single assertion, unsupported by argument or authority, which might be construed as referring to instruction No. 9. There are no other questions presented. Judgment affirmed.

NOTE.—Reported in 111 N. E. 316. See, also, under (1) 3 C. J. 1430; 2 Cyc 1013; (2) 17 Cyc 682, 687.

RODER v. NILES.

[No. 8,912. Filed February 4, 1916.]

1. **APPEAL.—Review.—Refusal to Strike Out Answer.**—The overruling of a motion to strike out certain paragraphs of answer was not error, where under the facts shown leave to file such paragraphs was a matter within the sound discretion of the court. p. 6.
2. **CONTRACTS.—Breach.—Complaint.—Answer.**—In an action for breach of a contract of employment, where the complaint was on the theory that the contract was originally in parol and afterwards reduced to writing, and it was manifest therefrom that certain obligations on the part of plaintiff had been omitted from such writing, so that the writing was more in the nature of a memorandum than a definite contract, it was competent for defendant to aver by answer what the omitted provisions were and to prove same by parol, since under the circumstances the contract must be deemed in parol and is controlled by the law governing parol contracts. p. 8.

Roder v. Niles—61 Ind. App. 4.

3. **CONTRACTS.—Proof of Consideration.**—Where the consideration of a contract is not expressed, parol evidence is admissible to show same. p. 8.
4. **CONTRACTS.—Action for Breach.—Findings.**—In an action on a contract, where there was no finding that plaintiff performed his part of the contract, nor of any fact on which substantial damages could be based, while on the other hand there were findings showing nonperformance by plaintiff, and that plaintiff was himself responsible for the failure of the enterprise which was to be developed, all supported by the evidence, the judgment for defendant can not be disturbed. pp. 9, 10.
5. **DAMAGES.—Failure to Assess Nominal Damages.—Harmless Error.**—Even though plaintiff is entitled to nominal damages, a failure to assess such damages is not ground for reversal. p. 10.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Robert Roder against Henry G. Niles, Jr. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Samuel B. Pettingill, Lenn J. Oare and Orie Parney, for appellant.

Graham & Crane, for appellee.

IBACH, C. J.—This is an appeal from a judgment for appellee in a suit brought by appellant to recover damages for his wrongful discharge during the term of his employment by appellee and for additional damages claimed to have been sustained by him because of appellee's failure to issue to him a number of shares of the capital stock in a proposed corporation. The contract upon which the action is based and which is claimed to have been breached is the following:

“Nov. 3, 1911.

I, Henry G. Niles, Jr., personally guarantee that the following contract with Robert Roder will be fulfilled by the company to be formed about January, 1912, for the purpose of manufacturing gas mantles and other products at Mishawaka, Ind. First, the company when

formed, to issue to said Robert Roder, \$750 worth of its stock, par value, in payment of certain supplies bought of said Roder. Second, said Robert Roder to be paid a salary of \$20 per week in cash from July 1st, 1911, to July 1st, 1912, unless he severs his connection with the business prior to that time, when the weekly payment of \$20 shall cease. Third, on July 1st, 1912, for the further and complete payment to Robert Roder for his services from July 1st, 1911, to July 1st, 1912, the Company is to issue to said Robert Roder at par value, the amount of stock equal to \$20 for each and every week from July 1st, 1911, that said Robert Roder has given his time to the development of the mantle business, provided that should Robert Roder sever his connection with the business prior to July 1st, 1912, the company is to issue to him stock at its par value for an aggregate amount equal to \$20 per week for each and every week from July 1st, 1911, that said Robert Roder has been with the company. Further, that said Robert Roder is to have the privilege of selling his stock to the company on July 1st, 1912, and that the company is to have the privilege of buying said Roder stock on July 1st, 1912, at its book value, as shown by inventory at that time. (Signed.) Henry G. Niles, Jr. Robert Roder."

Appellant contends that the court erred in refusing to strike out appellee's third and fourth paragraphs of answer to the complaint, in over-

1. ruling his demurrer to the same paragraphs of answer, and in the conclusions of law stated on the facts specially found. There is no merit in the first contention because the permission to file the additional paragraphs of answer complained of was under the facts of this case within the sound discretion of the trial court. These paragraphs of answer were filed eleven days before the trial. The

third paragraph avers that at the time of and contemporaneous with the execution of the written contract sued on and as a consideration for its execution, the parties entered into an oral agreement in substance that appellant was an expert gas mantle builder and had valuable formulae for the manufacture of marketable gas mantles, and that he also had suitable machinery for equipping a plant of that kind which he agreed to sell to appellee for \$750. That appellant would organize and build up a gas mantle manufacturing business for appellee and put it on a paying basis so that appellee might profitably incorporate the business. Appellant also agreed to instruct appellee and his employes in the various processes employed by him in the manufacture of the mantles and devote his entire time to the business. Appellee performed the conditions required of him by the oral agreement, as well as the written one, but that appellant failed and refused to do what was required of him, that he was not an expert mantle maker, did not possess valuable formulae, did not own suitable machinery for the business, and failed to sell and deliver suitable machinery therefor and that which he did furnish was wholly valueless, so that the mantles which appellant did manufacture were of an inferior quality and they were placed on the market before appellee discovered that they were not marketable and resulted in the destruction of appellee's business. Appellant did not instruct appellee's employes in the art of making mantles as he agreed to do and did not devote his entire time to the business, but voluntarily left appellee's employ on May 6, 1912. It is also averred that before the action was brought, appellee offered to return to appellant the machinery which he had furnished, that the business was a failure, because of appellant's breaches of the terms

of the contract, the business was never developed so that it could be profitably incorporated and stock issued, and, therefore, appellee was prevented from fulfilling his contract and he received no benefits whatever from the services performed by appellant or the supplies furnished by him. The fourth paragraph of the answer is in many respects similar to the third, the principal difference is that the fourth paragraph sets out in greater detail the material features of the oral contract which were not contained in the written memorandum. The complaint averred that a contract was concluded between the parties on July 1, 1911, and was afterwards reduced to writing. The theory of the pleading seems to

be that the contract was in parol, and after-

2. wards was reduced to writing. It is at once manifest, however, that there is omitted from such writing what appellant was to do, what service he was to perform, or what portion, if any of the equipment of the plant, or what supplies he was to furnish to entitle him to the compensation provided for. The contract itself was not a clear and complete one, it was more in the nature of a memorandum than a definite contract. Under such circumstances, it was competent for appellee to aver by answer what the omitted provisions were and to prove by parol the entire consideration which appellant was to exchange to entitle him to receive the compensation for services and materials which he now seeks to recover. In other words, the true contract made by the parties being partly in writing and partly parol, it was in law a parol contract, governed and controlled by the law affecting contracts of that nature. *Stauffer v. Linenthal* (1902),

29 Ind. App. 305, 64 N. E. 643. It has been

3. universally held that where the consideration of a contract is not expressed, parol evidence

is admissible to disclose the true consideration. *Howard v. Adkins* (1906), 167 Ind. 184, 190, 78 N. E. 665, and cases cited; *Baltes Land, etc., Co. v. Sutton* (1903), 32 Ind. App. 14, 69 N. E. 179. We conclude, therefore, that the overruling of appellant's motions to strike out the answers and the overruling of the separate demurrers to each, did not constitute reversible error.

But if there was error therein, it is clear from the entire record and particularly from the court's findings of fact that appellant could not have been harmed by such rulings. In order that ap-

4. pellant might recover in this action, it was incumbent upon him to prove that he had performed his part of the agreement, entered into between the parties, that appellee in one or more particulars failed to perform his part, and that by reason thereof appellant suffered substantial damage. There was no finding that appellant did perform his part of the contract, but on the contrary, there is an affirmative finding that he did not. There was no finding of the value of the stock proposed to be issued, or of the value of the machinery and supplies furnished by appellant or that appellant was damaged in any manner because he did not receive such stock, and no finding on which substantial damages could have been predicated. The absence of such finding on the question of damages is a finding against appellant, as the burden was upon him to prove that element of his case to entitle him to a recovery. The findings do show, however, that the business was a failure and the corporation was not organized and no stock issued for that reason. The rule seems to be that where suits are brought for a breach of contract to issue or deliver corporate stock, the measure of plaintiff's damage is the actual value of the stock at the time it should have been

delivered and if it appears that the stock had not been issued and would be of no value if issued plaintiff can recover only nominal damages. 3 Elliott, Contracts §2216; *Gibson v. Whip Pub. Co.* (1888), 28 Mo. App. 450; *Coffin v. State* (1896), 144 Ind. 578, 43 N. E. 654, 55 Am. St. 188. So that in view

of the state of the record in the case at bar

5. appellant, if entitled to any thing would not be entitled to more than nominal damages.

And the general rule is that a failure to assess nominal damages is not reversible error. *New York, etc., R. Co. v. Rhodes* (1909), 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225; *Pearson v. Wood* (1901), 27 Ind. App. 419, 61 N. E. 593.

The court also finds that appellant by his conduct made it impossible for appellee to keep him in his employ, and the effect of the findings on this

branch of the case is that appellant's own con-

4. duct caused the failure of the business and prevented appellee from performing his part of the contract. We are satisfied that the findings were supported by the evidence, and that the conclusions of law are fully justified by the findings. Judgment affirmed.

NOTE.—Reported in 111 N. E. 340. As to parol evidence to show consideration, see 56 Am. St. 664. See, also, under (1) 3 Cyc 328; 31 Cyc 669; (2) 9 Cyc 732, 733; (3) 17 Cyc 648; (5) 3 Cyc 446.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY COMPANY v. FISHER.

[No. 8,756. Filed November 17, 1915. Rehearing denied February 4, 1916.]

1. CARRIERS.—*Carriage of Passengers.—Duty to Protect Passengers.*
—A common carrier must protect its passengers against the misconduct of its own servants, and, as far as practicable, from violence committed by strangers and copassengers. p. 15.

2. **CARRIERS.—Carriage of Passengers.—Misconduct of Fellow Passengers.—Duty of Carrier.**—While not insurers of the safety of passengers, it is the duty of a common carrier to protect them from the unprovoked assault or misconduct of a fellow passenger, where its servants have knowledge of the existing conditions in time to afford such protection, or where such servants have reason to anticipate that the safety of passengers is imperiled by the misconduct of a fellow passenger. p. 15.
3. **CARRIERS.—Carriage of Passengers.—Injuries.—Misconduct of Fellow Passenger.—Complaint.**—In a passenger's action for injuries sustained by the act of a fellow passenger, a complaint showing the relation of passenger and carrier between plaintiff and defendant, that defendant's servants knew of a fight in another part of the train in which the fellow passenger participated and of the latter's condition at and prior to the injury to plaintiff, that after such fight such fellow passenger, who was drunk, angry, etc., was negligently permitted to enter the coach in which plaintiff was riding, that he fell upon plaintiff and crushed and injured her, and that plaintiff's injury occurred wholly and by reason of the defendant negligently and wrongfully and carelessly failing to perform its duty, and in negligently and carelessly permitting said fellow passenger to enter the coach wherein plaintiff was seated, was sufficient to withstand a demurrer. pp. 16, 17.
4. **NEGLIGENCE.—Pleading.—Proof.**—An allegation that an act was negligently done or omitted is equivalent to an allegation that there was a failure to exercise ordinary care in discharge of the duty to plaintiff, and the allegation of an ultimate fact in reference to the negligent failure to perform a duty is sufficient to admit proof of every evidentiary fact necessary to show the want of due care. p. 16.
5. **NEGLIGENCE.—Pleading.—General Averment.—Sufficiency.**—A general allegation of negligence is sufficient to withstand a demurrer for want of facts, hence the facts constituting negligence need not be stated in detail. p. 17.
6. **APPEAL.—Review.—Evidence.—Verdict.**—Where the record disclosed that the verdict was fully supported by the evidence, there was no error in overruling the motion for new trial upon the ground of insufficient evidence. p. 18.
7. **DAMAGES.—Instructions.—Refusal.**—There was no error in the refusal of an instruction setting forth that certain matters should not be considered in arriving at the measure of damages, where the court gave an instruction specifying what elements should be considered. p. 18.
8. **HUSBAND AND WIFE.—Wife's Action for Injuries.—Measure of Damages.—Instructions.**—In a married woman's action for personal injuries, an instruction informing the jury that the damages which she might recover should be limited to the injuries, if any, which she herself received, "and the consequences naturally flowing there-

Chicago, etc., R. Co. v. Fisher—61 Ind. App.10.

from", was not objectionable on the ground that the quoted phrase was susceptible of being understood as covering elements of damage for which she could not recover, when considered with the other instructions, and in view of the fact that the verdict was not such as to show that the jury was misled. p. 18.

From Sullivan Circuit Court; *Wm. H. Bridwell*, Judge.

Action by Ida M. Fisher against the Chicago, Terre Haute and Southeastern Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Lamb, Beasley, Douthitt & Crawford and *William F. Peter*, for appellant.

Oscar E. Bland and *John W. Lindley*, for appellee.

MORAN, J.—This was an action for personal injuries, which appellee claims to have suffered by reason of the negligence of appellant, growing out of the misconduct of a fellow passenger, while she was being transported on one of appellant's passenger trains from Jasonville, Indiana, to Linton, Indiana. A jury awarded appellee damages in the sum of \$750. From a judgment on the verdict, appellant appeals.

The errors assigned are: (1) overruling the demurrer to the amended complaint; (2) the complaint does not state facts sufficient to constitute a cause of action; (3) overruling appellant's motion to strike out parts of the amended complaint; (4) overruling appellant's motion for a new trial.

The amended complaint is in one paragraph and in substance states, that on September 30, 1911, appellant was a railroad corporation operating a railroad between Terre Haute, Indiana, and Seymour, Indiana, and that appellee became a passenger for hire at the station of Jasonville, with her

destination at the station of Linton. At Jasonville, a large number of drunken and boisterous men were negligently accepted by appellant as passengers, and shortly after entering the smoking car a quarrel ensued between five or six of such drunken men; that the conductor in charge of the train saw the altercation, but made no attempt to stop it. The participants were severely injured and blood flowed out upon their clothing from cuts and bruises, of which fact the passengers on the train were aware; at Midland station appellant stopped its train for the purpose of taking on and letting off passengers, and all of the drunken passengers left the train except one, who was negligently and wrongfully permitted by appellant to go into the ladies' and gentlemen's coach where appellee was riding; that he was drunk, angry, bleeding, weak and pale, his face and clothing were covered with blood, and as he was passing where appellee was sitting, he fell upon her with his full weight and crushed and injured her and soiled her clothing. Appellee at the time was pregnant and would have been delivered of a child within five or six months; and on account of the drunken man coming into the car, covered with blood and falling upon appellee, she became greatly excited and shocked, and from the shock, she became ill at the time, and in consequence thereof a miscarriage occurred October 6, 1911, and that appellee became a helpless wreck and is permanently injured. That prior to the injury, she was strong and healthy, but that since the injury she has not been able to perform any kind of labor by reason of the injury thus received. The injury occurred wholly by reason of appellant negligently, wrongfully and carelessly failing to perform its duties as alleged, and in appellant negligently and carelessly permitting the bleeding and angry passenger to enter the

car where appellee was seated; that appellant could have prevented the drunken passenger from going into said car and should have done so if it had performed its duty. Appellant had full knowledge of what was taking place on its car. Appellee was damaged in the sum of \$25,000.

Appellant's position that the complaint fails to state a cause of action as against the demurrer for want of facts may be summed up substantially as follows: The carrier's liability to a passenger for the misconduct of a fellow passenger is contingent, depending upon the carrier having knowledge of the misconduct of the fellow passenger, or where the attending circumstances are such that the injury to the passenger by the fellow passenger could have been reasonably apprehended by the exercise of due care; that the carrier is not responsible for subsequent misbehavior of a passenger when the same is of a different nature and kind and unrelated; that there is no causal relation disclosed by the complaint between the fight in one apartment of the train and the subsequent act which injured appellee in another apartment, namely, the falling of one of the participants in the fight after it had ceased; that the facts pleaded are not such as to disclose that appellant could have reasonably anticipated that the safety of the passenger was threatened and an injury likely to occur, especially in the absence of an averment that the passenger fell upon appellee as a result of his intoxication.

The general principle of law defining the duty of the carrier to the passenger set forth and supported by authorities in appellee's brief is not highly instructive as to the question here involved, as the case at bar does not fall strictly within the class of cases to which the general rule thus announced by appellee is applicable. "A common carrier is bound,

as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and copassengers, and undertakes absolutely to protect them against the misconduct of its own servants." *New Jersey Steamboat Co. v. Brockett* (1887), 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. See, also, *Stewart v. Brooklyn, etc., R. Co.* (1882), 90 N. Y. 588, 43 Am. Rep. 185. The question presented in this case involved that degree of care that the carrier is bound to exercise to prevent injury to a passenger at the hands of a fellow passenger, and to its duty in this particular we have confined our investigation.

It may be stated generally that, although
 2. common carriers are not insurers of the safety of their passengers, they are in duty bound to protect them from the unprovoked assault or misconduct of a fellow passenger, where the servants of the carrier have knowledge of the existing conditions for a sufficient intervening time between the acquisition of knowledge and the injury to protect their passengers; and this is true where the carrier's servants have reason to anticipate from the existing conditions that the safety of the passengers is imperiled by the misconduct of a fellow passenger. *United Railway, etc., Co. v. Dean* (1901), 93 Md. 619, 49 Atl. 923, 86 Am. St. 453, 54 L. R. A. 942; *Pittsburgh, etc., R. Co. v. Richardson* (1907), 40 Ind. App. 503, 82 N. E. 536; *Illinois Cent. R. Co. v. Minor* (1892), 69 Miss. 710, 11 South. 101, 16 L. R. A. 627; *Tall v. Baltimore Steam Packet Co.* (1900), 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120; *Evansville, etc., R. Co. v. Darting* (1892), 6 Ind. App. 375, 33 N. E. 636; *Flint v. Norwich, etc., Transportation Co.* (1868), 34 Conn. 554; 4 R. C. L. 1189, §611; *Irwin v. Louisville, etc.,*

R. Co. (1909), 161 Ala. 489, 50 South. 62, 135 Am. St. 153, 18 Ann. Cas. 772.

A duty was owing from appellant to appellee as the complaint discloses the relation of carrier and passenger existed at the time of the in-

3. jury. And further from the allegations of the complaint the servants of appellant, who were in charge of the train had knowledge of the altercation that took place in the smoking car between the passenger who caused the injury complained of and the other participants thereto, and likewise had knowledge of the condition of such passenger at and before the time the injury occurred. It is alleged among other things, "That one of said drunken passengers, whose name is not known to the plaintiff was negligently and wrongfully permitted by the defendant to go into said day ladies' and gentlemen's coach, in which plaintiff was riding. That he was drunk, angry, bleeding, weak and pale. That his face, body and clothing were completely covered and saturated with blood. That he came into said car, and as he was passing where plaintiff was sitting at the time, he fell upon her with his full weight and crushed and injured plaintiff," etc.

It was held in *Belt R., etc., Co. v. McClain*

4. (1915), 58 Ind. App. 171, 106 N. E. 742, that an allegation that an act was negligently done or negligently omitted is equivalent to an allegation that there was a failure to exercise ordinary care in the discharge of such duty. In the case of *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739, it was held that where an ultimate fact was alleged in reference to the negligent failure of a party to perform a duty that was owing that such a charge is sufficient to admit proof of

every evidentiary fact necessary to show the want of due care. In the light of these authorities

3. the allegation that the drunken passenger was negligently and wrongfully permitted by appellant to go into the ladies' coach where appellee was riding when the injury occurred, constitutes a charge of negligence, and when read in connection with the general charge of negligence in the complaint, "That said injury occurred wholly by reason of the fact that the defendant negligently and wrongfully and carelessly failed to perform its said duties as herein alleged, and in defendant negligently and carelessly permitting said bleeding, angry passenger to come into said car, as aforesaid, where plaintiff was seated", renders the complaint sufficient to withstand a demurrer as the complaint in fact charges that the appellant negligently allowed the drunken passenger to go into the car where appellee was seated and by reason of this negligent act appellee was injured. "It has been uniformly held by this court that a failure to

5. state in detail the facts constituting negligence does not render the pleading insufficient, and that a general allegation of negligence is sufficient to withstand a demurrer for want of facts." *Nickey v. Steuder* (1905), 164 Ind. 189, 73 N. E. 117. See, also, *Pittsburgh, etc., R. Co. v. Wilson* (1904), 161 Ind. 701, 66 N. E. 899; *Chicago, etc., R. Co. v. Barnes* (1905), 164 Ind. 143, 73 N. E. 91.

While the complaint lacks much of being a model pleading, no error was committed by the

3. trial court in overruling the demurrer to the same, as the infirmity urged against it could have been reached by a motion to make more specific.

No question is sought to be presented by the second and third assignments of error. An examina-

tion of the record discloses that the verdict is

6. fully supported by the evidence and no error was committed in overruling the motion for a new trial upon this ground.

This leaves for consideration the error based upon the refusal of the court to give instruction No. 33, requested by the appellant, and in giving in-

7. struction No. 34 of the court's own motion.

By instruction No. 33, appellant desired the jury to be informed by the court that there were certain elements that it must not take into consideration in arriving at the measure of appellee's damages, in the event its finding was in her favor. The court of its own motion properly informed the jury what elements it should take into consideration in measuring appellee's damages in the event it found she was entitled to recover; hence there was no error in refusing the instruction requested by appellant. *Oolitic Stone Co. v. Ridge* (1910), 174 Ind. 558, 91 N. E. 944. The objection to the giving of instruction No. 34 is that it was sus-

8. ceptible of being understood by the jury as covering certain elements of damages, which appellee, as a married woman, was not entitled to recover. In substance this instruction informed the jury that appellee's damages should be limited to the injuries, if any, which she herself received, "and the consequences naturally flowing therefrom". The phrase, "and the consequences naturally flowing therefrom", is the portion of the instruction specifically complained of by appellant. This instruction when considered in connection with the instruction given by the court of its own motion on the measure of damages could not have misled the jury; and in this connection our view is confirmed by the amount of the verdict.

Finding no available error in the record, the judgment is affirmed.

NOTE.—Reported in 110 N. E. 240. As to who are passengers to whom the carrier owes a duty, see 61 Am. St. 75. On liability of carrier for injury resulting from negligent or meddlesome act of fellow passenger, see 37 L. R. A. (N. S.) 724. As to the duty of a carrier to protect passengers against intoxicated passenger, see 8 Ann. Cas. 225; Ann. Cas. 1912 C 278. See, also, under (1) 6 Cyc 598, 602, 604; (2) 6 Cyc 602; (3) 6 Cyc 626; (4, 5) 29 Cyc 570; (6) 3 Cyc 348; (7) 38 Cyc 1711; (8) 13 Cyc 234, 247.

THE AULTMAN & TAYLOR MACHINERY COMPANY
ET AL. v. SHELL.

[No. 8,932. Filed February 15, 1916.]

1. APPEAL.—*Findings.—Evidence.—Review.*—The court on appeal can not weigh conflicting evidence, but, where the decision is challenged for insufficiency of the evidence, it will determine whether there is any evidence to support the decision, and in so doing will consider only the evidence most favorable to the appellee. p. 22.
2. SALES.—*Fraud.—Evidence.*—Where plaintiff, who was experienced, made a personal examination of a second-hand traction engine before purchasing same, and relied on his own judgment as to its fitness, although he also testified that defendant's agent stated that the engine would do the work if it was as good as recommended to him, and that those in charge of the engine at the time plaintiff examined it stated that it was all right and that leaking steam which plaintiff noticed was the result of a loose bolt, and the engine, after its purchase by plaintiff, leaked water and steam so as to render it useless, etc., the evidence was insufficient to warrant a finding that the sale of the engine to plaintiff was induced by fraudulent representations. pp. 22, 24.
3. FRAUD.—*Evidence.—Sufficiency.*—Fraud need not be proved by a particular kind or class of evidence, but to sustain a finding of fraud there must be some evidence from which fraud may be reasonably inferred. p. 24.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Edgar Shell against The Aultman &

Taylor Machinery Company and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

M. W. Hopkins and *Russell T. MacFall*, for appellants.

Bowers & Feightner, for appellee.

FELT, P. J.—This is a suit brought by appellee against the appellants, The Aultman & Taylor Machinery Company, and the Huntington County Bank, to annul a written order for the purchase of a traction engine and to cancel four promissory notes and have returned to him \$100 in cash paid by him on the order, on the ground that the order was procured by the fraud of appellant, The Aultman & Taylor Machinery Company, hereafter referred to as the appellant.

The complaint was in one paragraph and was answered by general denial. The only error assigned and relied on for reversal of the judgment rendered in appellee's favor is that the court erred in overruling appellants' motion for a new trial, the grounds of which are, (1) that the decision of the court is not sustained by sufficient evidence and (2) is contrary to law.

Omitting formal parts, the complaint in substance alleges that in October, 1912, appellee represented to appellant that he desired to purchase a steam traction engine for the purpose of drawing wagons loaded with crushed stone; that appellant by its agent represented to appellee that it had an engine suitable for that purpose, and thereupon appellee entered into an agreement in writing by the terms of which he agreed to purchase the engine for \$500; that as a part of said agreement appellant warranted the engine to be made of good materials and capable of doing as much work as any engine of like size and

capacity and to be in good condition; that thereupon appellant shipped the engine to appellee at Huntington, Indiana, and directed appellee to pay \$100 in cash and to execute four promissory notes each for \$100, to appellant at the Huntington County Bank; that after paying the money and executing the notes appellee learned that the engine was not of good quality, was not fit to do the work appellant represented it would do; that it was defective, in this that the boiler was so worn and cracked that it would not hold water; that appellee did not know of said defects when he contracted for the engine and they could not have been ascertained by ordinary inspection; that the boiler was absolutely worthless; that appellee did not know the defective condition of the boiler and engine and relied on the warranties and statements of appellant in regard thereto and believed them to be true; that said warranties and representations were wholly untrue, were fraudulently made and appellee was thereby misled and deceived to his damage, the particulars of which are alleged; that as soon as he discovered the true condition of the boiler he immediately notified appellant and it sent a representative to Huntington to examine the engine, but refused to repair the same; that appellee was induced to enter into the contract for the purchase of the engine and to execute the four notes and pay the \$100 to the Huntington County Bank for appellant, by the fraudulent representations aforesaid. Prayer that the bank be enjoined from delivering the \$100 cash to its co-appellant and be enjoined from transferring the notes, that the contract and notes be cancelled and that appellee have all proper relief.

Appellant and appellee agree that the complaint proceeds on the theory of fraud and that the case was tried on that theory. The finding in appellee's

favor is general and covers every material

1. allegation of the complaint. This court can not weigh conflicting evidence, but as the decision is challenged on the ground of the
2. insufficiency of the evidence, we are called upon to decide whether there is any evidence from which fraud may be reasonably inferred or found. The evidence relied upon to show fraud is in substance as follows: Appellee testified that in October, 1912, he called at appellant's place of business and informed its agent, one Arthur Cauble, that he desired to purchase a sixteen horse power second-hand engine to be used in drawing wagons loaded with crushed stone to and across a bridge; that said agent told him appellant had a second-hand engine that had been recommended to him as a good sixteen horse power engine and that if it was as good as recommended to him he believed it would do the work, if any sixteen horse power engine would do it, "but said he had never seen the engine and he would like to have me go and see it for myself"; that the engine was about twenty-five miles from Indianapolis in the possession of a man with whom appellant had had "a good bit of dealings" and "had always found him straight, and I could rely on whatever he told me"; that the agent with whom he talked did not go with him to see the engine; that he went and saw the engine and found it in use and couldn't examine it very well; that it was running very nicely; that he "talked to the old gentleman, but not much to the engineer"; that the old gentleman told him the engine was all right and in good shape; that he was there about twenty minutes and talked to no one but the old gentleman and the engineer; that he looked the engine over the best he could, got down on his hands to see if any thing was wrong, saw a place where a little steam was escaping and was in-

formed "there was a stay bolt that was loose"; that no water was coming out of the place which was under the boiler; that he did not see the stay bolt nor get down under the engine to see it, but asked what was "the cause of the steam coming out" and the engineer, the son of the man who had possession of the engine, told him the engine had fallen through a bridge, had broken the thread on the bolt and after that it had leaked around the stay bolt, but all it needed was a little tightening of the stay bolt; that he got upon the engine, looked it over as carefully as he could, "it seemed to look all right" and he saw nothing else wrong with it.

Appellee also testified that he had had twenty-five years of experience in using engines and other machinery and was an expert, and that he would have discovered anything wrong with the engine if he had gotten under it; that he went to examine the engine for himself and to rely on his own experience and fitness to judge of the engine. The evidence also shows without dispute that appellee learned it was a Reeves engine not made by appellant, that it had been in use about twelve years and that Mr. Gorham, in whose possession he found it, had owned it about three years and was trading it for a larger engine; that appellee looked at the leak under the engine twice. Appellee also testified that appellant priced the engine at \$550 and when he returned he told the agent he would not put that much in a second-hand engine; that he "didn't know anything about the flues", they were burning coal and he "couldn't see into the inside of the box", but if anything was wrong with the stay bolt he "could put that in"; that they finally agreed on \$500, and the agent wrote, and he signed, an order to buy the engine at that price; that he relied on the

statements made to him concerning the engine and believed them to be true.

For the purposes of this opinion, without setting out the evidence on other branches of the case, it is sufficient to state that it is sufficient to sustain the finding, if the evidence warranted the trial court in finding that appellee was induced to make the purchase by the fraud of appellant. In passing upon this question we can not weigh the evidence, but must consider only the evidence, if any, most favorable to appellee, which tends to prove the

3. fraud. Fraud need not be proven by any kind or class of evidence, but to sustain the finding there must be some evidence from which fraud may reasonably be inferred. The essential elements of fraud in a case like the one at bar have been stated many times, and, therefore, need not be repeated here. *Anderson v. Evansville Brew. Assn.* (1912), 49 Ind. App. 403, 405, 97 N. E. 445, and cases cited; *New v. Jackson* (1912), 50 Ind. App. 120, 124, 95 N. E. 328, and cases cited.

Conceding appellee's contention that appellant may be held responsible for any misrepresentation of a material fact, made by either Mr. Cauble

2. or Mr. Gorham, the evidence fails to warrant the inference that either of them knowingly misrepresented any material fact to appellee, or assumed to know any such fact he did not know and made a positive statement thereof to appellee to induce him to purchase the engine, or that appellee relied thereon and was thereby induced to purchase the engine. Mr. Cauble's statements are corroborated by those of appellee and show that he informed appellee that he had never seen the engine and that he only recommended it on condition it was found to be as it had been represented to him to be, and that he directed appellee to see and ex-

amine the engine for himself. The statements made by Mr. Gorham about the engine were made while appellee was viewing it and must be considered in the light of appellee's experience and opportunity to see and examine the engine for himself. It is important to observe that his attention was specially called to that part of the engine which he alleges was defective and that he had every opportunity to determine the accuracy of the statements made and actually stooped down and examined the part of the engine from which the steam was escaping. He was a man of experience and fully capable of judging for himself and testified that he went to see the engine and examined it intending to rely upon his own ability and judgment to determine the value and usability of the engine.

The case is wholly unlike many others where a person in some superior position or possessing some peculiar knowledge, has induced another to act, who depended upon, and had a right to depend upon, the statements so made, and was thereby induced to act while relying on such statements rather than upon his own judgment. In this case the evidence does not warrant the inference that appellee relied upon the statements made to him and was thereby deceived. True he states that he relied upon them, but he also states that he relied upon his own experience and judgment. The facts support the latter and do not tend to support his mere conclusion to the contrary. The only inference that may reasonably be drawn from the evidence presented by the record, is that appellee was a man fully capable of judging for himself, and that after examining the engine, without any interference or hindrance on the part of appellant, he acted on his own deliberate judgment in purchasing the engine at a price agreed upon about which there is no dispute. The judg-

ment is therefore reversed with instructions to sustain appellants' motion for a new trial.

Ibach, C. J., Caldwell, Moran, Hottel and Shea, JJ., concur.

NOTE.—Reported in 111 N. E. 445. As to the doctrine that fraud is never presumed, see 18 Am. St. 560. See, also, under (1) 3 Cyc 357; (2) 35 Cyc 66; (3) 20 Cyc 120, 122.

PICKETT ET AL. v. TOLEDO, ST. LOUIS AND WESTERN
RAILROAD COMPANY.

[No. 8,948. Filed February 15, 1916.]

1. STATUTES.—*Construction.*—*Legislative Intent.*—The prime object in the construction of statutes is to ascertain and carry out the purpose and intent of the legislature, and while the words used in a statute should first be considered in their literal and ordinary signification, the letter of the statute should not be followed where it leads to contradiction, absurdities or unjust results, and the intention as gathered from a consideration of the whole statute should control. p. 29.
2. RAILROADS.—*Fencing Tracks.*—*Statutory Requirements.*—Under §5447 Burns 1914, Acts 1885 p. 224, requiring every railroad company to maintain fences on both sides of its railroad through the entire length thereof, where one railroad is paralleled by the adjacent track of another company, neither company is required to construct or maintain a fence between the two tracks, since a contrary construction of the statute would result in absurdity and the imposition of unnecessary burdens, in view of §5445 Burns 1914, Acts 1885 p. 148, requiring gates at farm crossings and would lend no assistance in carrying out the evident object of the statute. p. 29.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Lola Pickett and others against the Toledo, St. Louis and Western Railroad Company. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

St. John, Charles & Gemmill and Bell, Kirkpatrick & Voorhis, for appellants.

Charles G. Guenther, Braden Clark, Geddes Van

Brunt, Clarence Brown and Charles A. Schmettan,
for appellee.

IBACH, C. J.—The undisputed facts of this case show that on August 24, 1912, and for some years prior, the right of way of appellee through the farm of appellant Lola Pickett was adjacent to and parallel with the right of way of the Indiana Railway and Light Company. Appellee maintained a fence in good condition along the north side of its right of way, but neither company had built a fence between their rights of way. On the day above mentioned, and for years before, there had been a private way over such land and across both rights of way, and where the same passed through the fences, gates had been built and maintained as provided by law. It had been the custom of appellants to pasture their hogs in a field south of the south right of way, and on the day above mentioned some one had permitted the south gate to remain open, thereby permitting such hogs to pass through and over and across the south right of way and on to appellee's right of way and tracks, where they were killed by one of appellee's trains. This action was instituted to recover the value of the stock killed.

There is no charge in the complaint that appellee's negligence consisted in the mismanagement of the train in any respect, or that the fences and gate through which the hogs entered on appellee's tracks were not in good condition or that the gate was opened through any fault of appellee, but the complaint proceeds wholly upon the theory that appellee was negligent in failing to construct and maintain a statutory fence along the south line of its right of way, which would be between its right of way and that of the traction company adjacent to and parallel therewith. There was a finding and

judgment for appellee. The sole question presented by this appeal is whether it was the duty of appellee to erect such a fence. The question is purely one of law under the undisputed facts and its solution depends upon the true construction of the existing statutes bearing upon that question.

Section 5447 Burns 1914, Acts 1885 p. 224, requires "That any railroad corporation * * * operating * * * any railroad into or through this state * * * shall erect, build, construct and thereafter maintain fences * * * on both sides of such railroad through the entire length, * * * sufficient and suitable to turn and prevent cattle * * * from getting on such road". In this section certain exceptions are provided for, none of which however apply to this case. Section 5445 Burns 1914, Acts 1885 p. 148, which with the foregoing section was enacted in 1885, provides that when such railroad is fenced on one or both sides at the point where any private wagon or driveway is established and maintained across the right of way of such railroad, the owner of the land for whose use and convenience any such private crossing is constructed and maintained, shall erect and maintain substantial gates in the line of such fence or fences across such way and shall keep the same securely locked when not in use by himself or employees.

The learned trial court in its discussion of these statutes uses this very apt language: "They were enacted almost thirty years ago and at a time when the paralleling of railroads through rural districts was a rare occurrence in the state, if at all. But in recent years many traction lines have been constructed throughout the state and invariably, as far as practicable, their rights of way have been secured and maintained along and adjoining the

rights of way of many of the steam roads of the state. This present condition did not exist at the date of the enactment of the above statutes, and could not then have been reasonably anticipated by or have entered in the minds of the legislators''. These are some of the matters which we are required to consider in determining whether the court should apply §5447, *supra*, strictly according to its letter, or according to its true intent and object.

One of the approved rules for the interpretation of statutes has been many times announced by the courts of this State in the following or similar language. In the construction of statutes, the

1. prime object is to ascertain and carry out the purpose and intent of the legislature. To do this the words used in the statute should be first considered in their literal and ordinary signification, but the letter of the statute should not be followed where it leads to contradiction, absurdities or unjust results. We must look to the whole statute and the intent of the legislature as deduced therefrom must in the final analysis be the guide to its proper interpretation. *Storms v. Stevens* (1885), 104 Ind. 46, 3 N. E. 401.

We believe the construction of the statute insisted on by appellant does not express the evident intent of the legislature and the enforcement

2. of such construction would lead to absurd results. Consider, for example what the result would be if there were more than two parallel lines of road passing through appellant's farm; such a condition might exist as would lead to the construction of a large number of dividing fences and gates, and the maintenance of a large number of private crossings and gates which would be of no use or value to any one, but on the contrary would create a useless burden and expense to all owners of

such private crossings. Such results could not have been within the intent of the legislature. In discussing these fencing statutes by our own courts, and in many respects similar ones by the courts of other jurisdictions, it has been repeatedly announced that the object of such acts was to give the owners of animals compensation for stock killed or injured and as a police regulation to secure as far as possible safety of the public travel and transportation. Keeping these evident objects of the statute in mind, we are unable to see how the construction and maintenance of the additional fence insisted upon by appellant would in any manner assist in carrying out these purposes. In fact it could not serve any useful purpose, but on the contrary, would be an additional and unnecessary obstruction to the crossing, and consequently there could be no excuse for its presence. *Hunt v. Lake Shore, etc., R. Co.* (1887), 112 Ind. 69, 13 N. E. 263; *Jeffersonville, etc., R. Co. v. Dunlap* (1887), 112 Ind. 93, 13 N. E. 403.

On examination of these and many other cases we find that the courts in construing such statutes have refused to adhere to a literal interpretation of them and have departed more widely than we are required to do here to carry out the evident purpose of the legislature and avoid the doing of a useless and unnecessary thing. While the statutes do not in express terms relieve railway companies from fencing their rights of way where such fences are evidently unnecessary for any purpose, yet we believe that such exceptions are necessarily implied where their uselessness clearly appears and their presence would only create additional inconveniences and burdens. We conclude, therefore, that to adopt the more rational construction of these statutes rather than a strictly literal one insisted on by appellant would meet the evident purpose and intent

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of the legislature and necessitate the holding that under the undisputed facts of this case it clearly appears the appellee and the traction company had so constructed their fences as to meet the intent and purposes of the fencing statutes, and, therefore, appellee was under no duty to fence the south side of its right of way between such right of way and the traction company's right of way at the place in question. Judgment affirmed.

NOTE.—Reported in 111 N. E. 434. As to rules for the construction of statutes, see 12 Am. St. 827. See, also under (1) 36 Cyc 1106, 1128; (2) 33 Cyc 1198.

GOLDBERGER v. GOLDBERGER.

[No. 8,951. Filed February 15, 1916.]

APPEAL.—*Findings.*—*Conclusiveness.*—Special findings of fact will not be set aside on the ground of the insufficiency of the evidence where there is some evidence to sustain them, and in the absence of anything to show that the court made a mistake in arriving at the result.

From Superior Court of Allen County; *John H. Aiken*, Special Judge.

Action by Max Goldberger against Maurice Goldberger. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Vesey & Vesey, for appellant.

Owen N. Heaton, for appellee.

SHEA, J.—Appellee, Max Goldberger, brought this action against appellant, Maurice Goldberger, for an accounting for money alleged to have been received by appellant on collection of certain fire insurance policies assigned to him by appellee. The court, upon proper request, made a special finding of facts and stated conclusions of law thereon favorable to appellee; that he was entitled to an account-

ing, and appellant was indebted to him in the sum of \$909.65, for which amount judgment was rendered in appellee's favor. The only error relied on for a reversal is the overruling of appellant's motion for a new trial, in support of which appellant argues, (1) that the damages awarded are excessive; (2) that the decision of the court is not sustained by sufficient evidence.

In the brief filed on behalf of appellant it is stated that: "The finding of facts furnishes a very excellent history of the case and is conceded to be true except as to numbers 10 and 20." Appellant's attorneys also state on page 39 of their brief that there are no legal propositions involved in this appeal, and, therefore, they cite no authorities, so that the sole question presented here is one of fact. It is shown, in substance, by the special finding of facts that in September, 1907, appellee was the owner of a stock of merchandise and fixtures situate in a store building owned by him in the city of Pueblo, Colorado, where he then resided, on which he carried policies of insurance against loss by fire in various companies aggregating \$16,500; that on September 28, 1907, said property was destroyed by fire. Proofs of loss were filed with the several insurance companies by appellee, claiming a total loss under said policies. The proofs of loss were rejected for various reasons, including a claim that appellee had set fire to his said property and payment was refused. In February, 1908, appellee was tried, convicted of the crime of arson, and sentenced to a term of years in the Colorado penitentiary. Appellant, who was a brother of appellee, took an assignment of the various insurance policies aggregating \$16,500, with the understanding and agreement that he should bring suit for their collection, and after paying the expenses incurred therein,

pay to appellee the remainder. Pursuant to this agreement appellant advanced to appellee various sums of money, including \$650 as attorneys' fees and expenses in perfecting an appeal. The court further finds that the aggregate amount of moneys advanced and expenses incurred was \$4,783.60. After much negotiation, the various suits against the insurance companies on the policies were settled on a basis of \$6,500; deducting the amount found to be due appellant, there remained a balance in appellant's hands of \$854.65, which with \$55 interest thereon, amounted to \$909.65, the amount of the judgment herein.

Objections were made to special findings Nos. 10 and 20, respectively. Said findings read as follows: "That a few days after the defendant's (appellant's) return to Fort Wayne, Indiana, A. W. Harrington, attorney for the plaintiff (appellee) in said criminal proceeding wrote this defendant that this plaintiff would make an absolute assignment of said policies to this defendant if this defendant would pay said attorney \$650 necessary to prosecute said appeal of said criminal case. This proposition was not accepted by plaintiff, but thereafter plaintiff and defendant agreed that plaintiff should assign all of his said policies to defendant and defendant should collect the same, and out of any sum collected should re-emburse himself for all moneys paid or advanced for plaintiff and for all expenses of collection. Subsequently, said policies were all assigned by this plaintiff by endorsing his name thereon and were forwarded by express to this defendant." No. 20: "That the defendant herein, out of said sum paid the detectives so employed by him, the sum of \$600 as commission upon the amount of said collection as so agreed by him, which payment was reasonable, in

view of the difficulties encountered in the collection of said sum”.

With respect to special finding No. 10, it is contended that the evidence showed conclusively that appellant made an absolute purchase of the insurance policies upon which he collected the money in dispute, and, he was, therefore, not liable for an accounting; that finding No. 10 is in exact opposition to the facts thus shown by the evidence.

It is settled that special findings of fact will not be set aside on the ground of the insufficiency of the evidence, unless there is no legal evidence to sustain them. *Muncie, etc., Traction Co. v. Citizens Gas, etc., Co.* (1913), 179 Ind. 322, 100 N. E. 65. There is evidence to the effect that there were some negotiations between appellant and appellee concerning the collection of the losses sustained by appellee, and the steps that should be taken to realize on the insurance policies, which finally resulted in their assignment to appellant. Appellee states that the assignment was made to secure appellant for moneys advanced to him; that after the expenses incurred were paid, the remainder, if any, was to be paid to him. Appellant claims that the sale was absolute, that whatever he realized from the policies after paying expenses was to be his own. The trial court evidently weighed these conflicting statements and gave most credit to the appellee. Under the settled rule we can not say that there is no evidence to sustain the court's finding.

It is also urged, in connection with finding No. 20, that even if appellant were liable to account, and held the insurance policies in a trust capacity, he was liable for a sum considerably less than that adjudged against him; that by finding No. 20 the court finds that appellant paid detectives employed by him the sum of \$600, which he is allowed upon his ac-

count. Appellant insists that the only testimony upon this subject was his own, which was to the effect that for this purpose he had paid \$950; that it is true that in the court's finding the word "detective" is used, and in the testimony the word "adjuster" is used, and if correct in this contention the decision and judgment were for \$350 more than appellee was entitled to recover. We can not say from an examination of the evidence before us that the trial court was confused by the use of the terms "detective" and "adjuster" interchangeably to the extent that a mistake of \$350 was made in reaching the result stated. Taking into account all of the items set out in the special finding, to which appellant is entitled to credit, and deducting them from the amount he received from the insurance company, charging him with \$55 interest to which no objection seems to have been made, the total amount due appellee as found by the trial court is \$909.65. There being evidence to sustain the finding of the trial court upon each particular item as above stated, this court will not disturb the decision of the court below. Judgment affirmed.

NOTE.—Reported in 111 N. E. 453. See, also, 3 Cyc 360, 370.

ANCHOR LIFE INSURANCE COMPANY v. MEYER.

[No. 8,985. Filed February 16, 1916.]

1. **INSURANCE.—Action on Policy.—Complaint.**—A complaint based upon a standard form of life insurance policy, alleging the execution of the policy and the death of the insured from a cause within its terms, and that plaintiff and the insured fully performed all the conditions of the policy to be performed by them, and disclosing nothing to the effect that the death resulted by reason of insured being engaged in any prohibited occupation, was sufficient as against demurrer. p. 37.

2. **INSURANCE.—Action on Policy.—Complaint.—Negating Exceptions in Policy.**—Plaintiff in an action on a life insurance policy need not negative the exceptions contained therein, as they are matters of defense. p. 37.
3. **INSURANCE.—Action on Life Policy.—Defenses.—Death from Use of Explosives.**—Under a life policy exempting the company from liability if death ensued from the act of insured in making or using explosives, etc., the company could not avoid liability for the death of insured by the explosion of a steam boiler used in connection with the operation of a sawmill. p. 39.
4. **INSURANCE.—Action on Life Policy.—Answer of Fraud.—Sufficiency.**—In an action on a life policy, an answer on the theory of fraud by the insured in falsely stating the nature of his occupation, was insufficient in the absence of any averment to show that the defendant elected to avoid and rescind the contract after discovery of the fraud by returning or tendering back the premiums paid. p. 40.
5. **INSURANCE.—Construction of Policy.—Application.**—Where an application for insurance is by the terms of the policy made a part thereof, it and the policy are to be construed as one contract. p. 40.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by Louise Meyer against the Anchor Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Clarence B. Kessinger and *George W. Kenney*, for appellant.

Wm. M. Alsop and *Wm. H. Hill*, for appellee.

MORAN, J.—Appellee recovered a judgment of \$5,285 against appellant in a trial by the court in an action on a life insurance policy, issued upon the life of her husband, and in which she was the beneficiary.

Appellant, in prosecuting this appeal, assigns as errors, (1) the overruling of the demurrer to the complaint, (2) the sustaining of the demurrer to the amended second paragraph of answer of appellant, (3) the sustaining of the demurrer to the third paragraph of answer, (4) the overruling of the motion for a new trial.

The objection raised to the sufficiency of the complaint is that the policy, which is a part of the complaint, provides that during the first year of the life of the policy, the assured should not engage in certain prohibitive employment without the written consent of the company, and which he did without such written consent. The complaint is based upon

a standard form of life insurance policy, and

1. after showing the execution of the policy and the death of the assured, and that the cause

2. of his death was one insured against by the policy, further alleges as to performance that the assured "and this plaintiff have duly performed all the conditions of said policy on their part to be by them performed". This is a sufficient allegation of performance on the part of the assured and appellee. Further the complaint does not disclose that the assured met his death by reason of engaging in any employment prohibited by the terms of the policy. It is not necessary to negative warranties or exceptions in a policy in a complaint to enforce the same, as they are matters of defence. *Phoenix Ins. Co. v. Pickel* (1889), 119 Ind. 155, 21 N. E. 546, 12 Am. St. 393; *Modern Woodmen, etc. v. Noyes* (1902), 158 Ind. 503, 64 N. E. 21; *Louisville Underwriters v. Durland* (1890), 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399; *Home Ins. Co. v. Boyd* (1898), 19 Ind. App. 173, 49 N. E. 285; *Grand Lodge, etc. v. Barwe* (1906), 38 Ind. App. 308, 75 N. E. 971; 4 Joyce, Insurance §3684; *Commercial Union Assur. Co. v. State, ex rel.* (1888), 113 Ind. 331, 15 N. E. 518; *Federal Life Ins. Co. v. Arnold* (1910), 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357. The complaint is sufficient to withstand a demurrer for want of facts.

The second amended paragraph of affirmative answer when reduced to its final analysis proceeds

upon the theory that the assured met his death while he was engaged in a business prohibited by the policy. That the policy provided that the assured should not, among other things, become engaged "in making or using explosives", within one year from the issuing of the policy without the written consent of appellant; and it alleges that within a year from the issuing of the policy he was killed by the explosion of a steam engine, of which he was a part owner, which he was operating on his brother's farm, in running a sawmill. That the business thus engaged in at the time of his death was in violation of the policy and forfeited the same. The third paragraph of affirmative answer proceeds upon the theory of fraud, in that the assured in his application for insurance, which became a part of his policy of insurance, stated in answer to a question propounded to him as to his business that he was a farmer and stock dealer, and had been such for thirty years, and was not engaged in any other business. It is further alleged that in truth he was at the time and had been for more than a year prior thereto, in addition to being a farmer and stock dealer, engaged in the hazardous undertaking of running a steam engine for the purpose of furnishing power to operate a threshing machine and sawmill; and in connection with two brothers he had been for more than ten years the owner of a sawmill and threshing machine and had during a portion of the time in each year assisted his brothers in operating the sawmill and steam engine, and the assured knowingly and fraudulently misrepresented said fact to appellant. That appellant relied upon the correctness of the answers he made, and had appellant known that the assured was engaged in a dangerous and hazardous business, it would not have issued said policy of insurance, or if issued, it

would have been for a smaller amount at an increased premium; and appellant accepted the policy in ignorance of the fraudulent misrepresentations contained in the answer to the questions propounded, and continued in ignorance until the accident occurred, which caused the death of the insured.

To get the full sense and meaning of the stipulation thus relied upon by appellant in its second paragraph of answer as a defence, it is neces-

3. sary that it be read in connection with all other business or employments forbidden, viz., "engaging in handling electric, wires or dynamos, making or using explosives, blasting, mining, submarine labor, aeronautic ascensions, coupling and switching cars, employment on any steam or sailing vessel, or railroad train or engine, except as a passenger or sleeping car conductor within one year from the date of the policy without the written consent of the company shall work a forfeiture of all rights under the policy issued herein."

An explosive is defined as "any substance whose decomposition or combustion is generated with such rapidity that it can be used for blasting or in fire-arms." Century Dictionary; 19 Cyc 2. Under a Massachusetts' statute, regulating, prescribing and prohibiting certain things to be done within the municipalities of the state, explosives, as used in connection with prohibiting the keeping of the same in excess of a given quantity, are defined "to include guncotton, nitroglycerin, or any compound thereof, and any fulminate or any substance intended to be used by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder." 1 Rev. Laws, Mass. (1902), Chap. 102, §105. It is clear, we think, that the assured, while assisting in running a steam engine in connection with the operation of a sawmill, as dis-

closed by the second paragraph of answer, was not engaged in "making or using explosives" within the terms of the policy of insurance; and that the demurrer was properly sustained as to the second paragraph of answer.

The third paragraph of answer, as aforesaid, proceeds upon the theory of fraud, which is based principally upon the following questions and

4. answers in the application, viz., "7. Occupation. State business and duties (if more than one occupation, give all). 7. Farmer and stock dealer. 8. What was your former occupation? 8. Same for thirty years." Which answers it is contended were false and known to be such by the assured and unknown to appellant, and upon which it relied: and that the assured represented and agreed that all answers made in the application for insurance were true and complete, and if not so, the insurance to be void. The application for insurance by appellee's husband was by the

5. terms of the policy made a part of the contract of insurance. The application and policy are, therefore, to be treated and construed as one contract. *Moulton v. American Life Ins. Co.* (1884), 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Indiana, etc., Ins. Co. v. Rundell* (1893), 7 Ind. App. 426, 34 N. E. 588; *First Nat. Bank v. Hartford Fire Ins. Co.* (1877), 95 U. S. 673, 24 L. Ed. 563; *Catholic Order, etc. v. Collins* (1912), 51 Ind. App. 285, 99 N. E. 745. Among the reasons assigned why the paragraph of answer under consideration is

4. not sufficient to withstand a demurrer is that there is no allegation that appellant on discovering the fraud elected to avoid the contract of insurance, nor any allegation as to the tendering or offering to return the premiums paid by the assured. As already said this paragraph of

answer is based upon fraud, and that by reason of the fraud on the part of the assured all rights thereunder have been forfeited. The recent decisions of this and the Supreme Court settle the question in appellee's favor. A defence such as is attempted to be set up in the third paragraph of answer to be good must disclose that the insured elected to avoid and rescind the contract after discovering the fraud. The paragraph of answer under consideration fails to show any steps whatever taken by appellant to do so. From aught that the paragraph of answer discloses, appellant intends to retain the premiums received, as not even an equitable tender of the premiums is pleaded. This it can not do. The principle of law, and each phase of the same, as applicable to the third paragraph of answer, is fully covered by the following decisions and authorities there cited. *Commerical Life Ins. Co. v. Schroyer* (1911), 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914 A 968; *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *State Life Ins. Co. v. Jones* (1911), 48 Ind. App. 186, 92 N. E. 879; *American Cent. Life Ins. Co. v. Rosenstein* (1910), 46 Ind. App. 537, 92 N. E. 380. It will serve no useful purpose to reiterate the reasons for the rule of law thus announced. In view of the foregoing authorities, the demurrer to the third paragraph of answer was properly sustained.

The conclusion we have reached makes it unnecessary to pass upon the question sought to be raised as to the assignment of error based upon the overruling of the motion for a new trial. Judgment affirmed.

NOTE.—Reported in 111 N. E. 436. As to what constitutes insurable interest in human life, see 102 Am. St. 554. As to the necessity for pleading as a defense to a suit on an insurance policy election to avoid contract for breach of warranty, see 14 Ann. Cas. 91. See, also, under (1) 25 Cyc 916, 918; (2) 25 Cyc 917; (3) 25 Cyc 823; (4) 25 Cyc 921; (5) 25 Cyc 745.

SMITH v. TOTH ET AL.

[No. 9,120. Filed February 16, 1916.]

1. WORDS AND PHRASES.—*"Gross".—"Net".*—The word "gross" when used to characterize a sum of money conveys the idea of a named or indicated amount before diminution, but from which there are to be taken other sums or amounts, leaving a balance, and the word "net" suggests a balance after all deductions have been made from a larger sum. p. 45.
2. CONTRACTS.—*Construction.—Admissibility of Parol Evidence.*—A written contract, clear and unambiguous, should be interpreted solely from a consideration of its terms, and enforced as thus interpreted; hence if the court hears parol evidence for the purpose of clarifying such a contract and gives effect to it as thus interpreted, the decision is contrary to law. p. 48.
3. CONTRACTS.—*Construction.—Admissibility of Parol Evidence.*—Where a contract is ambiguous and uncertain, and its language admits of more than one construction, parol evidence of prior and contemporaneous negotiations and statements may be admitted and considered to aid in its construction, and the contract should be enforced as thus interpreted. p. 49.
4. SPECIFIC PERFORMANCE.—*Contracts.—Construction.—Review.*—In an action for specific performance of a contract granting an option for the purchase of real estate "at and for the sum of \$3,000 cash net" to grantor, and binding grantor to furnish abstract showing good title except as to special assessments, and to convey the real estate "free and clear of all liens whatever", the court properly heard and considered parol evidence to aid in the interpretation thereof, since the contract was ambiguous, and there being evidence to sustain the court's decision against plaintiff, the decision could neither be disturbed for insufficiency of evidence nor upon the theory that it was contrary to law. p. 49.
5. SPECIFIC PERFORMANCE.—*Contracts.—Denial of Remedy.*—Where an option contract for the purchase of real estate is ambiguous as to the amount to be paid in case the option is exercised, the purchaser understanding that he is to pay a certain sum and the grantor understanding that he is to receive a larger sum, there is no meeting of the minds of the parties as to a material matter, and specific performance of such contract will be denied. p. 49.
6. APPEAL.—*Review.—Waiver of Error.*—Alleged error in the exclusion of testimony is waived by failure of appellant's brief to disclose the place in the transcript where the action complained of may be found, and also by appellant's failure to direct any of the points and authorities to such alleged error. p. 50.

From Lake Superior Court; Johannes Kopelke,
Judge.

Action by Clarence Smith against John Toth and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

A. Ottenheimer and L. V. Cravens, for appellant.

George B. Sheerer and Kennedy & Lotz, for appellees.

CALDWELL, J.—Appellant brought this action to compel the specific performance of the following contract:

"I, John Toth and Susanna V. Toth, of East Chicago, Indiana, for and in consideration of the sum of One Dollar to me in hand paid by Clarence C. Smith, of East Chicago, Indiana, do hereby give to said Clarence C. Smith, his heirs and assigns, the privilege of purchasing on or before the 10th day of February, 1912, the following described real estate, situated in the county of Lake and the State of Indiana, to wit: Lots thirty-one (31) and thirty-two (32) * * * at and for the price of Three Thousand (3,000.00) cash net to said Toth. Said money to be paid on or before the 15th day of February, 1912, to John V. Toth and Susanna V. Toth. I also agree to furnish an abstract of title showing good title to said real estate, except special assessments payable after Nov. 1, 1911. In case the privilege of purchase hereby given is exercised, I agree to convey and assure the said real estate to said Clarence C. Smith, his heirs or assigns by a good and sufficient warranty deed, reciting a consideration of \$1.00 free and clear of all liens whatever. John V. Toth, Mrs. Susanna V. Toth. Accepted by me this 10th day of January, 1912. Clarence C. Smith. Witness: G. H. Jacobson."

It is alleged in the complaint that appellant on January 29, 1912, exercised his option to purchase by notifying appellees (by which term, as used in this opinion, is meant Toth and Toth, unless other-

wise indicated), in writing to that effect, and that said appellees thereupon furnished him an abstract of title to the real estate, which disclosed a mortgage thereon reduced to a judgment in a foreclosure proceeding in the sum of \$1,887.23, and that appellant thereupon tendered to Toth and Toth in lawful money the difference between \$3,000 and the amount of the judgment and demanded that they accept it and convey the real estate to him by warranty deed, all of which they refused to do. The other appellees were made defendants by reason of being subsequent purchasers from Toth and Toth. The cause having been placed at issue by the filing of appropriate answers and replies, a trial by the court resulted in a decision and judgment for costs in favor of appellees.

The questions presented arise under the motion for a new trial, and are the insufficiency of the evidence, that the decision is contrary to law, and alleged error in the exclusion of certain offered testimony. The principal matter in controversy grows out of conflict in the constructions placed on the contract. Appellant contends that by the terms of the contract he bound himself on his election to avail himself of the option thereby extended to him to pay \$3,000 for the property free of all liens thereon, except special assessments, payable after November 1, 1911. Appellees, Toth and Toth, however, contend that by the terms of the contract, appellant, in case he elected to purchase the property, agreed to pay them \$3,000 for the property subject to all liens thereon, the existence of which they claim were well known to the parties.

It is apparent from an inspection of the contract that each party may point to a stipulation thereof as a foundation for his contention. Thus, it is provided that the price shall be \$3,000 cash net to Toth.

From other provisions considered alone, it is plausible to urge that the appellant agreed to pay \$3,000 cash after appellees had discharged all liens, except the assessments named, or that out of the \$3,000 they were to discharge such liens. However, in connection with such construction

1. the word "net" must be considered. If the \$3,000 was intended to be a sum a part of which should be used to discharge liens, and only the residue to remain ultimately in the hands of appellees, the word "gross" rather than "net", or the use of no qualifying word at all would have been more apt. The word "gross" when used to characterize a sum of money, conveys the idea of a named or indicated amount before diminution, but from which there are to be taken other sums or amounts, leaving a balance. The word "net" suggests a balance after all deductions have been made from a larger sum. *Scott v. Hartley* (1891), 126 Ind. 239, 25 N. E. 826; 29 Cyc 670. The word "net" is in the contract, and some value should be assigned to it. Its use evidently contemplates the payment of something, as the expense of the sale or of making the abstract, the payment of liens or some other expenditure, and that whatever it means, appellees should be relieved from making such payments. But appellees agreed to convey the property by warranty deed "free and clear of all liens whatever". This language, considered alone, placed upon them the obligation to discharge all liens. If they assumed such an obligation and there were liens against the property which they were required to pay in the transaction of selling, and in such transaction they should receive from appellant but \$3,000, how could it be said that they received such sum cash net? No one contends, however, that appellees were to discharge all liens against

the property. It is conceded as stated in the contract in substance, that they were not to pay the assessments named. How then can it be claimed that they obligated themselves to convey the property free of all liens? The contract, when only certain parts of it are considered, might be susceptible of a construction that appellees agreed to convey the property free of all liens, except the assessments, but still we must deal with the word "net". Under such circumstances, the trial court for the purpose of elucidating the contract heard parol testimony concerning transactions leading up to and attending the execution thereof, and also subsequent thereto. The court's action in so doing is not challenged on this appeal. Such parol testimony is conflicting to a marked degree, but from it there may be gleaned the following as tending to sustain the decision: Appellant was engaged in buying and selling real estate on his own account and for others. Appellees Toth and Toth are Hungarians, unable to read or write English, but able in a degree to carry on a conversation in that language. Shortly before January 10, 1912, Mrs. Toth called on appellant at his office for the purpose of selling or arranging to sell the real estate involved. She informed him that there was a mortgage on the property amounting to about \$1,800. She said to him they wanted about \$5,000 for the property, and priced it to him for \$3,000, he to discharge the mortgage. Appellant attempted to communicate with the mortgagee by telephone, to ascertain the exact amount of the mortgage, but failed. At a subsequent visit, appellant exhibited to Mrs. Toth a card containing a statement of the mortgage indebtedness, showing a balance of something more than \$1,800. Thereafter, and before the contract was executed, a news item appeared in the papers to the

effect that the Baldwin locomotive works would be located at East Chicago, whereby the real estate market was materially stimulated. Thereafter, on the evening of January 10, Jacobson, appellant's agent, called on appellees, Toth and Toth, and presented the contract above set out, prepared ready for execution. Appellees' son, a youth of nineteen, educated in English, was present, and he was called on to read the contract, and interpret it into Hungarian. This he did by reading the contract and talking with Jacobson in English respecting its provisions, and by communicating the latter's statements to his parents in Hungarian. The son testified that the mortgage was discussed with Jacobson, and that he said that appellees would be paid \$3,000 after appellant had paid the mortgage; that such was the meaning of the word "net" as used in the contract; that the "clear of all liens" provision meant that appellees' debts would be paid. The son communicated this information to his parents, and they then signed the contract. The son and his parents testified that Jacobson said as he left that they need not be surprised if he came around the next day with \$3,000. Later Mrs. Toth delivered at appellant's office an abstract complete to a prior date. Later appellees at appellant's request called at appellant's office and were informed by him that there was trouble, and that he could not handle the property; that the completed abstract showed a \$1,500 judgment against Mr. Toth, rendered in another matter, and also that the property was advertised for sale on the mortgage foreclosure. Toth then said to appellant that he did not know of the existence of the judgment (which seems to have been rendered against him possibly on default in a personal injury matter), and that appellant need not bother further about the prop-

erty. As the Toths owned the real estate as tenants by the entireties, the judgment last named, being against Mr. Toth alone, was not a lien upon it. The abstract apparently was not present at this interview, and Mrs. Toth, therefore, later called for it. In the presence of appellant, his attorney removed from the abstract the additions bringing it down to date, and delivered it to her. Later under date of January 26, appellant mailed to appellees a registered letter notifying them that he would exercise his right to purchase the lots under the contract. Appellees, Toth and Toth, testified that the dollar mentioned in the contract was not paid, and that appellant at no time tendered or offered to pay to them any money on the contract or ever asked them to execute to him a deed. As we have indicated, on all material points, except respecting what appellees' son communicated to them in Hungarian at the time of the execution of the contract, the evidence was sharply conflicting. Appellant insisted at the trial that appellees refused to consummate the sale only because the mortgage indebtedness was larger than they supposed. It is thus apparent that the court heard parol evidence respecting the contract which the parties claimed

2. they intended to make, and it does not appear that such parol evidence was not considered in construing the written contract which the parties subsequently executed. If the written contract is plain and unambiguous, the court should have interpreted it solely from a consideration of its terms, and should have enforced it as so interpreted. If the court failed to do so, but gave effect to the contract as clarified by such parol evidence, and if the conclusion so reached was different from that that would have been arrived at from a consideration of the provisions of the written contract alone, and if

it is plain, complete and unambiguous as aforesaid, a decision so reached is contrary to law. This follows from an application of the well-settled principle that where a contract is reduced to writing and signed by the parties, it being plain, complete and unambiguous, all prior parol negotiations are merged therein, and parol evidence cannot be heard to vary or contradict its terms. *O'Brien v. Higley* (1904), 162 Ind. 316, 70 N. E. 42. But if the writing is ambiguous and uncertain, and its language admits

3. of more than one construction, parol evidence of prior and contemporaneous negotiations and statements may be admitted and considered to aid in its construction, and to arrive at the intention of the parties as ambiguously expressed therein, and the contract should be enforced as thus interpreted. *Warren v. Marshall* (1906), 166 Ind. 88, 75 N. E. 582; *Hensler v. Fountain Park Co.* (1914), 57 Ind. App. 100, 106 N. E. 384.

It is evident that the contract here is ambiguous. The court therefore, properly heard and considered parol evidence. It follows, from a

4. consideration of the evidence as above outlined that under the rule that governs on appeal in this sort of case, the court's decision, refusing a specific performance of the contract, as sought, is fairly sustained by the evidence, and, that it is not contrary to law. *Parkison v. Thompson* (1905), 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; *Jones v. Luddington* (1913), 180 Ind. 33, 101 N. E. 483.

There is another view of this case: It is apparent from an inspection of the contract that it is uncertain respecting the price appellant was re-

5. quired to pay for the real estate, in the event that he elected to purchase it. There was abundant evidence, not however without contradiction, that appellees executed the contract in the full

belief that by its terms they were to be paid \$3,000 cash net over and above the amount of the mortgage indebtedness. If it should be held that the contract, when submitted to the strict rules of constructions, by its terms required appellant to pay but the residue of the \$3,000 after the discharge of the mortgage, and that he in fact so understood it to specify, it would follow that the minds of the parties did not in fact meet respecting the terms of the option sale. It thus appears that we have here a contract ambiguous in a material matter, and respecting the subject of which ambiguity the parties did not in fact agree. It is apparent also that if appellees were mistaken respecting the proper interpretation of the contract, and that they signed it under a misapprehension as to its meaning, there was evidence warranting the court in finding that appellant both in person and by his agent, in things done and said, contributed to the existence of such misapprehension and, thereby induced the execution of the contract. Under such circumstances courts of equity refuse to decree specific performance. *Rudisill v. Whitener* (1907), 15 L. R. A. (N. S.) 81, and extensive note; *Louisville, etc., R. Co. v. Bodenschatz Stone Co.* (1895), 141 Ind. 251, 39 N. E. 703; *Burke v. Mead* (1902), 159 Ind. 252, 64 N. E. 880; *McCauley v. Schatzley* (1909), 44 Ind. App. 262, 88 N. E. 972; *Burkhalter v. Jones* (1884), 32 Kan. 5, 3 Pac. 559; *Wilkin v. Voss* (1903), 120 Iowa 500, 94 N. W. 1123; *Hopwood v. McCausland* (1903), 120 Iowa 218, 94 N. W. 465; *Cawley v. Jean* (1905), 189 Mass. 220, 75 N. E. 614; 36 Cyc 605.

Respecting the excluded testimony, appellant has failed in his brief to refer us to the place in the transcript where the action complained of

6. may be found. In addition, in appellant's brief, no point is directed to these assign-

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ments. The involved questions are, therefore, not presented, and, if presented, they are waived. Moreover, the questions propounded to witnesses, as set out in the motion for a new trial, show by their form that the court properly excluded the testimony sought. The judgment is affirmed.

NOTE.—Reported in 111 N. E. 442. As to the basis of the doctrine of specific performance, see 128 Am. St. 383. For a discussion of the right to specific performance of optional contracts, see 1 Ann. Cas. 990; 12 Ann. Cas. 90; Ann. Cas. 1913 A 362. See, also, under (1) 20 Cyc 1367; (2) 9 Cyc 577, 587, 588; (3) 9 Cyc 587; 17 Cyc 662; (5) 36 Cyc 595; (6) 3 C. J. 1415, 1430; 2 Cyc 1015, 1017.

WATTS, ADMINISTRATOR v. THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

[No. 8,085. Filed February 4, 1914. Rehearing denied October 6, 1915. Transfer denied February 17, 1916.]

1. **APPEAL.—Review.—Instructions.—Conflict.**—An instruction that if defendant violated an ordinance by running the train which killed plaintiff's decedent at an excessive rate of speed, and if such excessive speed was the proximate cause of decedent's death, the verdict should be for plaintiff, and one stating that the mere running of a train in excess of the speed allowed by municipal ordinance is not actionable negligence in favor of a trespasser, and that if plaintiff's decedent was a trespasser, and the defendant's only negligence was in running the train at a speed in excess of that allowed by ordinance, the verdict should be for defendant, were inconsistent with each other and the giving of same was error. p. 53.
2. **RAILROADS.—Injuries to Persons on Track.—Evidence.—Instructions.**—In an action to recover for the death of one who was run down by a train, where the question of whether decedent was on a public street at the time of receiving his injury was a controverted fact on which evidence was heard, an instruction stating that "it does not appear that decedent was upon any street or highway, or any crossing or place where he had a right to be", was erroneous as invading the province of the jury. p. 54.
3. **RAILROADS.—Injuries to Persons on Tracks.—Last Clear Chance.—Instructions.**—In an action for the death of a person who was struck by a train under circumstances making the doctrine of last clear chance applicable, instructions, though correctly stating the general duty of defendant toward trespassers, but omitting the last clear chance rule, were erroneous. p. 55.

4. RAILROADS.—*Injuries to Persons on Track.*—*Duty to Trespassers.*—*Instructions.*—*Last Clear Chance.*—An instruction that the jury was not to consider what some other engineer might have done with the train which killed plaintiff's decedent as the railroad company owed no duty to a trespasser to man its engine with skilful engineers, that defendant was only bound by the acts of the engineer after he had discovered the decedent and appreciated his danger, and that if, after such discovery, the engineer used reasonable care and diligence to stop the train the plaintiff could not recover, was erroneous in stating that defendant owed no duty to decedent until it knew and appreciated the danger of decedent. p. 55.
5. RAILROADS.—*Duty to Trespassers.*—*Last Clear Chance.*—While a railroad company would not be liable for the death of a trespasser run down by one of its trains merely from the fact that such train was at the time being run at a speed in excess of that provided by a city ordinance, it is the duty of the engineer on discovering an object on the track ahead of his train to use reasonable care to ascertain what it is, and there may be a liability if the facts warrant an application of the doctrine of last clear chance. (*Dull v. Cleveland, etc., R. Co.* [1898], 21 Ind. App. 571, overruled.) p. 55.
6. APPEAL.—*Review.*—*Instructions.*—*Answers to Interrogatories.*—The court on appeal can not say that erroneous instructions are harmless in view of the jury's answers to interrogatories, where it does not appear that the interrogatories would not have been differently answered had proper instructions been given. p. 58.
7. APPEAL.—*Review.*—*Instructions.*—*Record.*—Where certain instructions were lost, and the trial court by order duly entered of record permitted a substitution of such lost instructions, and no error or omission was pointed out in the instructions thus embodied in the record, the action of the trial court was not an abuse of discretion, and appellant's objection that the instructions are not all in the record can not prevail. p. 58.

From Benton Circuit Court; *James T. Saunderson*, Judge.

Action by Millard Watts, as administrator of the estate of Philander Clawson, deceased, against The Chicago and Eastern Illinois Railroad Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

J. Wesley Whicker and *Charles R. Milford*, for appellant.

Homer T. Dick and *Charles W. Snyder*, for appellee.

SHEA, J.—This action was brought by appellant as administrator of the estate of Philander Clawson, deceased, against appellee to recover damages on account of decedent's death caused by the locomotive and cars of appellee. Briefly, the facts appearing from the complaint are that on April 11, 1908, between four and five o'clock p. m., decedent was walking on and along the track of appellee, within the city limits of the city of Attica, Fountain County, Indiana, and at that time was in an intoxicated condition. He had walked to a point near the southerly corporation limit of said city, when he fell down or lay down on appellee's track between the rails, and was unable to arise and get away from such dangerous place. While lying there a passenger train of appellee going south ran over him and killed him. Decedent was a strong, able-bodied man, forty-nine years old, capable of earning three dollars per day, and left surviving him his widow and five children, the oldest eleven years, for whose benefit appellant brought this action. A trial of the issues submitted to the jury resulted in a verdict and judgment for appellee, railroad company, and against appellant for costs. The only error assigned is the overruling of appellant's motion for a new trial. The alleged causes therein set out are based wholly on the instructions given in the cause, to which proper exceptions were saved.

It is contended first on behalf of appellant that there is a clear conflict between that part of instruction No. 14 given by the court at ap-

1. pellant's request reading as follows: "Hence if you find from the evidence in this cause that

the defendant violated said ordinance by running the train which killed said Clawson, at a rate of speed faster than ten (10) miles per hour, within the corporate limits of said city, and find that that

excessive speed was the proximate cause of the killing of said Clawson, then your verdict should be for the plaintiff in such an amount as you deem to have been proved by the evidence", and instruction No. 11, given at the request of appellee, which reads as follows: "The mere running of a train at a rate of speed in excess of that limited by a municipal ordinance is not actionable negligence in favor of a trespasser, and if, in this case you find that plaintiff's decedent was a trespasser, and if you further find that the only negligent act of the defendant, its officers, agents and servants was the running of its train through the city of Attica at a higher rate of speed than was permitted by its ordinance then your verdict should be for the defendant." These two instructions are clearly in conflict, and could have no other result than to be confusing, as the principle was one of vital import to the jury in considering the evidence in the case, and could not be held to be harmless. Instruction No. 14 given at the request of appellee is criticised because of the following language: "It does not appear that

2. decedent was upon any street or highway or any crossing, or place where he had the right to be." The question whether decedent was upon a public street at the time of his injury and death was one of the controverted facts in the case, and for that reason it is insisted that the court invaded the province of the jury in using the language above quoted. An examination of the record discloses that appellant's contention in this respect is true; that this was one of the controverted questions, evidence was heard, and the jury was instructed upon this point, so it is clear that the court invaded the province of the jury, and the instruction is erroneous.

Instruction No. 32 given at the request of appellee

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is subject to criticism as it omits the doctrine of last clear chance which has been approved by

3. our courts. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N.E. 1091; *Evansville, etc., Traction Co. v. Johnson* (1913), 54 Ind. App. 601, 97 N. E. 176.

Instruction No. 12 tendered by appellee is

4. subject to the same criticism. Instructions Nos. 16, 17 and 21 given at appellee's request omit also to point out clearly to the jury the duty

5. of appellee's servants in charge of said engine to use reasonable care to keep a lookout ahead for danger when an object is discovered upon the track. Instruction No. 21 reads as follows: "You are not to consider what some other engineer might have done with the train which killed Philander Clawson as the railroad company owed no duty to a trespasser to man its engine with skillful engineers. The defendant is only bound by the acts of the engineer after the engineer discovered Philander Clawson and appreciated his danger, and if you find that after such discovery the engineer used reasonable care and diligent efforts to stop the train, then I instruct you that the defendant has done all the law requires it to do and the plaintiff would not be entitled to recover." It is in evidence that some space of time elapsed between the time the engineer saw an object on the track and his discovery that it was a man. Taken altogether, the instructions impress the court as having been entirely too favorable to appellee in this case. It is true that in our State the rule as laid down in instruction No. 11 set out above is held to be a correct rule. *Welty v. Indianapolis, etc. R. Co.* (1886), 105 Ind. 55, 4 N. E. 410; *Woods v. Board, etc.* (1891), 128 Ind. 289, 27 N. E. 611; *Terre Haute*.

etc., R. Co. v. Graham (1884), 95 Ind. 286, 48 Am. Rep. 719. It is, however, tempered by the doctrine of last clear chance, where that doctrine has proper application, to such an extent that it can not be said that it is rigidly adhered to in all cases, even as against a trespasser. In many jurisdictions it is held to be negligence not to discover the peril of the trespasser when the exercise of ordinary care would have caused the peril to be discovered, and consequent injury avoided. *Morris v. Chicago, etc., R. Co.* (1876), 45 Iowa 29; *Grand Trunk R. Co. v. Ives* (1892), 144 U. S. 408, 428, 430, 12 Sup. Ct. 679, 36 L. Ed. 485; *Dunkman v. Wabash, etc., Co.* (1888), 95 Mo. 232, 4 S. W. 670; *Pickett v. Wilmington, etc., R. Co.* (1895), 117 N. C. 616, 23 S. E. 264, 53 Am. St. 611, 30 L. R. A. 257; *Purinton v. Maine Cent. R. Co.* (1887), 78 Me. 569, 7 Atl. 707; *Donohue v. St. Louis, etc., R. Co.* (1886), 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; 7 Am. and Eng. Ency. Law (2d ed.) 387; *Bullock v. Wilmington, etc., R. Co.* (1890), 105 N. C. 180, 10 S. E. 988; *Crawford v. Southern R. Co.* (1899), 106 Ga. 870, 33 S. E. 826; *Barker v. Savage* (1871), 45 N. Y. 191, 194, 6 Am. Rep. 66; *Northern Cent. R. Co. v. State, ex rel.* (1868), 29 Md. 420, 438, 96 Am. Dec. 545; *Cawfield v. Ashville St. R. Co.* (1892), 111 N. C. 597, 600, 16 S. E. 703; *Scoville v. Hannibal, etc., R. Co.* (1884), 81 Mo. 434, 440. It was the duty of the engineer when he discovered an object which he was approaching upon the track, which might have been an infant or a person in a helpless state of intoxication, to use reasonable care to ascertain what that object was. Whether he used such reasonable care was a question of fact to be determined by the jury, hence the instructions given by the court, that appellee owed no duty to appellant's decedent until it knew and appreciated the danger of such decedent, were erroneous. This is a

wholesome principle which has received the sanction of text-book writers and many decided cases. In 2 Shearman & Redfield, Negligence (6th ed.) §483, the learned author uses this language: "It has been held if the engineer becomes aware of anything lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train, so as to enable him to stop in time to avoid injury; and if injury ensues from his neglect to do this, his sincere belief that the object was worthless is no defence." In 1 Thompson, Negligence §232, the following language is found: "The rule that where the person or the animal happens to be in the position of a trespasser on the railroad track, the railway company owes them no duty of discovering them and averting injury to them, and owes no duty to them after discovering their exposed position, except not wantonly to run them down as trespassers—is found in the expressions of some courts. It is a disgrace to any civilized system of jurisprudence." In the case of *Baker v. Wilmington, etc., R. Co.* (1896), 118 N. C. 1015, 1020, 24 S. E. 415, the court uses this language: "A glance at the case of *Pickett v. Wilmington, etc., R. Co.*, *supra*, must satisfy any one that the opinion, like that in *Deans v. Wilmington, etc., R. Co.* [1890], 107 N. C. 686 [12 S. E. 77, 22 Am. St. 902], and in *Clark v. Wilmington, etc., R. Co.* [1891], 109 N. C. 430 [14 S. E. 43, 14 L. R. A. 749], is founded upon the assumption that any one who exposes himself to danger by going on a trestle or lying down upon the track to sleep, whether drunk or sober, is guilty of negligence. But that negligence is not deemed the proximate cause of an injury received, where the engineer, by discharging the duty of watchfulness plainly imposed upon him by repeated rulings in this State,

could subsequently have saved the party from all harm. * * * The court did hold in Pickett's case that, notwithstanding such negligence on the part of a careless boy or a drunken man, an engineer was not thereby licensed to kill him, but was to keep the same outlook for his safety as for that of a cow or a hog". *Bourrett v. Chicago, etc., R. Co.* (1909), 121 N. W. (Iowa) 380; *Inland, etc., Coasting Co. v. Tolson* (1891), 139 U. S. 551, 559, 11 Sup. Ct. 653, 35 L. Ed. 270; 2 Thompson, *Negligence* (1880 ed.) 1174, §22. In so far as the case of *Dull v. Cleveland, etc., R. Co.* (1899), 21 Ind. App. 571, 52 N. E. 1013, is in conflict with the doctrine herein announced, it is expressly overruled. Instruction No. 21 above set out was erroneous. Instructions Nos. 16 and 17, in so far as they state the same principle, are also erroneous.

Appellee very earnestly insists that in spite of the erroneous instructions, the answers to interrogatories in this case show the correct conclusion

6. was reached. This court is not able to say that the interrogatories would have been answered as they were if proper instructions had been given, therefore we can not say that the instructions were harmless. Appellee also urges that the in-

7. structions are not all in the record, and therefore any errors committed in the instructions given as shown by the record, may have been withdrawn or corrected by said omitted instructions. It is disclosed that instructions Nos. 18, 19, 20 and 22 tendered by appellant were lost, and could not be found after diligent search by the attorneys. Attorneys for appellant then offered to substitute said lost instructions by those which appear in the record. The court by order duly entered of record permitted this to be done. We can not say that this was an abuse of the court's discretion, in view of the

fact that no error or omission is pointed out in the instructions thus embodied in the record.

Judgment reversed, with instructions to grant appellant's motion for a new trial and for other proceedings not inconsistent with this opinion.

NOTE.—Reported in 104 N. E. 42. As to invasion by court of the province of the jury, see 14 Am. St. 36. On the railroad company's duty to avoid injury to persons in helpless position on track, see 25 L. R. A. 790; 69 L. R. A. 513. As to the duty of trainmen, on perceiving object the character of which is unknown, but which in fact is a trespasser helpless on track, see 2 L. R. A. (N. S.) 498. For the doctrine of last clear chance, in case of undiscovered persons, see 55 L. R. A. 424; 36 L. R. A. (N. S.) 957. As to whether wantonness or willfulness, precluding defense of contributory negligence, may be predicated on omission of a duty before discovery of a person in peril on a railroad track, see 21 L. R. A. (N. S.) 427. As to the liability of a railroad, running a train in violation of a speed law, for injuries to trespassers, see 5 Ann. Cas. 1007. See, also, under (1) 38 Cyc 1604; (2) 33 Cyc 913; 38 Cyc 1672; (3) 33 Cyc 910, 915; (4) 33 Cyc 910; (5) 33 Cyc 795, 797, 854; (6) 38 Cyc 1811; (7) 2 Cyc 1076.

RAUB v. LEMON ET AL.

[No. 8,509. Filed April 13, 1915. Rehearing denied November 5, 1915. Transfer denied February 17, 1916.]

1. **EJECTMENT.—Title of Plaintiff.—Pleading and Proof.**—Plaintiff, in an action of ejectment, alleging legal title to the real estate in controversy, is bound thereby and can not recover on proof of an equitable title. p. 67.
2. **EJECTMENT.—Title of Plaintiff.—Evidence.—Review.**—Where plaintiff in ejectment alleged legal title in himself, and introduced in evidence a deed absolute on its face, as well as an unrecorded contemporaneous instrument purporting to be a contract of purchase and sale whereby the real estate involved was to be conveyed to defendant upon his performance of the conditions therein recited, and there was no evidence to show that the deed to plaintiff together with such contemporaneous instrument constituted a mortgage, it was error for the trial court to limit the probative scope of a subsequent writing, whereby defendant surrendered all rights under such contemporaneous instrument, to consideration merely upon the question of plaintiff's right to possession and not upon the question of title; and, even on the assumption that plaintiff's deed was in fact a mortgage and the contemporaneous instrument a defeasance, the ruling of the court can not be

sustained, since, there being no showing to the contrary, it must be presumed that the subsequent surrender of defendant's rights under the defeasance was *bona fide* and sufficient to preclude defendant from equitable relief on the theory of "once a mortgage always a mortgage". pp. 68, 72, 78.

3. MORTGAGES.—*Nature and Effect*.—A mortgage is but a lien on land as security for a debt, and the legal title remains in the mortgagor subject to the lien of the mortgage. p. 71.
4. CONTRACTS.—*Cancellation of Instrument of Defeasance*.—*Conveyances*.—An agreement for the cancellation of an instrument that was executed contemporaneously with a deed of conveyance and provided for a reconveyance to grantor on his performance of certain conditions, is not a conveyance within the meaning of §3957 Burns 1914, §2926 R. S. 1881. p. 71.
5. APPEAL.—*Review*.—*Theory of Case*.—While the court on appeal will hold a party to the theory of the case adopted in the trial court, such theory will be determined by a consideration of the whole record, hence the mere designation by appellant's counsel of an instrument as a "defeasance" at the time of offering it in evidence was not of controlling importance on the question of theory, in view of the whole record which indicated that it was a conditional contract for the sale of real estate. p. 77.

From White Circuit Court; *Charles W. Hanley*, Special Judge.

Action by Charles J. Raub against Thomas Lemon and another. From a judgment for defendants, the plaintiff appeals. *Reversed*.

Palmer & Carr, for appellant.

Sills & Sills, for appellees.

HOTTEL, C. J.—The appellant filed a complaint in the court below in which he alleges that he is the owner of the fee simple title, and entitled to the immediate possession, of certain real estate in White County, and that the defendants and each of them unlawfully hold possession thereof to his damage. Prayer for possession and damages for detention. The defendants answered by general denial. There was a trial by the court and both parties requested a special finding of facts and conclusions of law thereon.

The finding of facts and conclusions of law were in appellant's favor. Appellees filed a motion for a new trial for cause which was overruled. Judgment was then entered in appellant's favor, adjudging that he was the owner of the fee simple title in such real estate and entitled to the possession thereof. A new trial as of right was granted on motion of appellees. There was then a change of judge and the cause was submitted to a jury for trial.

On the second trial of the cause the following proceedings, pertinent to the questions presented by the appeal, were had in the trial court. The appellant introduced the following documentary evidence, viz., (1) a warranty deed of date, January 22, 1907, from Jacob Fisher, *et al.*, being all the heirs of the estate of David Fisher, deceased, in which, for the recited consideration of \$4,400, they conveyed and warranted to Thomas Lemon the real estate in question. (It was agreed that these grantors were the owners in fee simple of the real estate in controversy at the time of their conveyance.) (2) A deed of date of April 1, 1907, from Thomas Lemon and his wife Alice in which, for the expressed consideration of \$4,400, they conveyed and warranted the fee simple title of the real estate in question to Charles J. Raub and Chalmers H. Yambert. (3) A warranty deed to an undivided one-half of the same real estate of date April 12, 1909, from Charles J. Raub, single and over twenty-one years of age, to Joseph R. Raub, consideration \$1,600, subject to a \$1,000 mortgage of date April 8, 1908, given by Charles J. Raub to Chalmers H. Yambert, due April 8, 1909. (4) A warranty deed to an undivided one-half of the same real estate of date March 9, 1911, from Joseph R. Raub, single and over twenty-one years of age to Charles J. Raub, consideration \$1,600, subject to taxes, etc.

(5) A warranty deed to same real estate of date October 6, 1911, from Chalmers H. Yambert and his wife Alice E. to Charles J. Raub, consideration \$1,000, grantee assuming taxes and assessments then a lien on said real estate, etc. (6) A contract made April 1, 1907, contemporaneous with second deed above, the provisions of which affecting the question here involved, are as follows:

“This article of agreement and contract for purchase and sale of real estate, made this 1st day of April, 1907, between Charles J. Raub, and Chalmers H. Yambert, party of the first part and Thomas Lemon, party of the second part, Witnesseth, that if the party of the second part shall first make the payments and perform the covenants, and do the acts herein-after mentioned, on his part to be made, performed and done the said party of the first part hereby agrees to convey to the said party of the second part, in fee simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed the following described real estate, in White County, in the State of Indiana, to wit, (here follows description substantially as that in the deeds heretofore indicated). It is hereby further stipulated between the parties, for the considerations named herein, passing between the parties, that when said conveyance shall be so made by said party of the first part the said party of the second part shall accept said conveyance, subject to payment by the said party of the second part of all unpaid taxes thereon at the time of such conveyance, including all taxes upon said real estate that may have been paid by the party of the first part at any time, after this date and prior to such conveyance and including also all assessments for drains, highways, or other special assessments, that may at the time fixed for such conveyance be a lien upon said real estate, all of which the said party of the sec-

ond part assumes and agrees to pay when they shall become due. As a consideration passing from the said party of the second part to the said party of the first part, for such conveyance of real estate, said party of the second part agrees to pay the said party of the first part the sum of \$5,100, of which the sum of \$1,000 shall be due and payable on or before the first day of October, 1907, and \$4,100 shall be due and payable on or before the first day of April, 1908, with interest at the rate of six per cent per annum, upon all of said purchase price, the interest on \$2,000 of said sum to be payable semi-annually and the interest upon the balance of said sum to be paid when the said principal sum shall become due, to wit, on April 1, 1908. Whenever any amount of said consideration shall be paid, prior to said April 1, 1908, then in that case interest shall cease upon the amount so paid. Said sum so agreed to be paid by the party of the second part to the party of the first part shall be payable without relief from valuation or appraisement laws, and with attorney fees, and it is further agreed by and between the said first and second parties that said sum so to be paid, in whole and in part shall be in the following manner, to wit, said party of the second part is to have immediate possession of said real estate with the right to clear said land and to cut all the timber therefrom and to saw and manufacture the same into lumber and timber products, but the proceeds of said timber, when so cut and marketed by the said party of the second part is to be paid, without deduction of any kind for expenses of cutting, sawing or manufacturing or otherwise, to the said party of the first part, as a part of the consideration above herein fixed for the purchase of said land. The said party of the second part is not himself to receive any part of the proceeds of said timber or lumber so sawed and manufactured from said timber but it is here agreed by and between all of the parties hereto

that Fred Dahling, now cashier of the Bank of Reynolds, at Reynolds, Indiana, shall be the collecting agent who shall receive from purchasers to whom any of the products of said timber and lumber shall have been sold, the consideration therefor, and he, the said Fred Dahling, or his successor, if his successor shall at any time be selected, is authorized to immediately pay over all such proceeds to be received by him to the said party of the first part, and the said party of the first part shall credit all such payments when so made as payments upon the consideration hereinabove fixed to be paid by the said party of the second part to the said party of the first part, first upon any interest that may be due upon said consideration, and next to be applied upon said principal sums, and said Fred Dahling shall note such payments, when made, upon a copy of this contract which shall be held by him.

* * * In case the said party of the second part shall do and perform all the acts and make the payments agreed herein to be done, performed, and made by him, within the time provided for in this agreement, then the said parties of the first part, their heirs and assigns, shall convey the said land to the said party of the second part, his heirs and assigns as provided above herein, and in case of failure of the said party of the second part to make the payments, and do and perform the acts agreed herein to be made, done and performed, then in that case the said party of the second part shall forfeit his right to receive a conveyance of said real estate, and shall surrender, immediately upon any such failure the possession of said real estate together with the timber and manufactured products of such timber then upon said real estate, together with all the products of said timber remaining unsold except the said party of the second part may have the right to retain the possession of such wood as may have been cut from tops, as provided

heretofore in this agreement, and in case of such failure of the party of the second part said party of the second part shall forfeit all payments made by him on this contract and such payments shall be retained by said parties of the first part in full satisfaction and liquidation of all damages by them and the said parties of the first part shall have the right to reënter upon and take possession of said real estate without notice. * * * .”

(7) The appellant then offered in evidence the following writing:

“This contract entered into this 18th day of April, 1908, by and between Charles J. Raub and Chalmers H. Yambert parties of the first part, and Thomas Lemon party of the second part—Witnesseth: That to settle all matters pertaining to forfeiture of contract of purchase entered into April 1, 1907, by and between Raub and Yambert and said Lemon, and in adjustment of all matters, it is mutually agreed that said (1) contract of April 1, 1907, shall be regarded as cancelled and forfeited and all money paid be regarded as rent. (2) That said Lemon releases all rights under said April 1, 1907, contract, and said Raub and Yambert release said Lemon from the obligations of said contract. (3) That title to said real estate shall be regarded as absolute in said Raub and Yambert. (4) Two-sevenths of the money derived from the sale of railroad ties now located along the side of the ‘Y’ railroad siding at Reynolds, Indiana, shall go to said Raub and Yambert and the money derived from the five-sevenths (5-7) interest of Thomas Lemon in said ties shall go to Fred Dahling. Fred Dahling of Reynolds, Indiana, shall be constituted as the agent of said Raub and Yambert and the said Lemon to sell said ties and collect money from same and distribute the money as heretofore agreed upon less his ex-

penses for same. (5) All of said buildings upon said tract of land owned by Raub and Yambert, shall become the absolute property of said Raub and Yambert. (6) That all ties, lumber and sawlogs now cut from the trees on said land shall be the absolute property of said Raub and Yambert, except said Lemon shall have all the trees now cut down on said land that is not cut into logs, ties or lumber together with the firewood now cut. Said Lemon is to remove sawmill and all the personal property owned by him by November 1, 1908, otherwise title to said personal property on said land shall become the absolute property of said Raub and Yambert, and full and absolute possession shall be given said Raub and Yambert by November 1, 1908. Said Lemon is to burn the brush made by him. Said Raub and Yambert have full power and authority over said premises, and said Lemon has absolute authority to work up said material, as above described but he will in no wise interfere with said Raub and Yambert to assert their rights in having their trees or timber worked up into lumber, or to make improvements."

The appellee objected to the admission of this writing, and the court in admitting it, limited the purpose for which it might be considered as follows: "The court now overrules the objection and admits the paper in evidence as being evidence bearing upon the right of possession and the court sustains the objection in so far as the paper is offered as tending to show title. The court being of the opinion that the deed and contract executed on the 1st day of April, 1907, being a mortgage and the offer of the paper, the character and wording of the paper being such as to confirm the court in that belief and these being the reasons for the court's ruling in this manner." To this statement and limitation placed on the probative force and effect of such evidence the appellant at the time excepted.

A written demand for possession, signed by Charles J. Raub and Chalmers H. Yambert of date February 6, 1909, was also given in evidence. All the deeds above referred to were recorded, but the other instruments, so far as the evidence discloses, were not recorded. There was also evidence of a verbal demand for possession made by appellant and a refusal by appellees to deliver up possession. There was some other evidence, but for the purposes of the questions presented by the appeal it is not necessary that it be indicated.

At the close of appellant's evidence the court instructed the jury as follows: "The court instructs you that in the complaint in this case it is alleged that the plaintiff is the owner in fee simple of the real estate therein described. I instruct you that the plaintiff has not introduced any evidence which tends to show a legal title in him but merely an equitable title and I instruct you to find a verdict for the defendants." Pursuant to this instruction the jury returned a verdict for appellees. Appellant filed a motion for new trial and assigned among other grounds that of the ruling of the court in limiting the force and effect of said writing as above indicated, and the action of the court in giving said instruction. These grounds of his motion are relied on for reversal. As affecting the questions thus presented appellant, in effect, concedes that,

1. in his complaint, he alleged a legal title to the real estate in controversy; that he is bound by such averment, and was not entitled to recover on proof of an equitable title. *Stout v. McPheeters* (1882), 84 Ind. 585; *Groves v. Marks* (1869), 32 Ind. 319; *Coppock v. Austin* (1904), 34 Ind. App. 319, 72 N. E. 654; *Johnson v. Pontius* (1889), 118 Ind. 270, 20 N. E. 702. Appellant

insists, however, in effect, that he offered in

2. evidence a deed from appellees which was absolute on its face and which conveyed and vested in the grantee therein, the fee simple title to the real estate in question, and that the other evidence given in the case did not change the character of such title, or, at least, that under all the evidence introduced in the case, the question whether appellant had proven a fee simple title to such real estate was one of fact for the jury, to be determined by it under proper instructions as to the law applicable to the facts, and hence that the court erred in giving the peremptory instruction, above indicated. Appellees on the other hand insist, in effect, that said deed, from Lemon, though absolute on its face, was in fact a mortgage, that such deed should be construed with the contemporaneous agreement, and when so construed the question whether the two together constituted a mortgage was a question of law for the court, and that the court properly held that such instruments in fact constituted a mortgage; that being once a mortgage they always remained a mortgage and could not be changed by an after agreement cancelling the agreement made contemporaneous with the deed, and hence that appellant's title to said real estate was only equitable, and that the peremptory instruction of the trial court was proper. All the questions here suggested and involved are, we think, discussed and settled in the cases of *Wilson v. Carpenter* (1878), 62 Ind. 495, and *Ferguson v. Boyd* (1907), 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064. In the former case the appellee, who was defendant below, filed a first paragraph of answer which set up facts very similar to the facts involved in the instant case, except that the averments of such answer gave much stronger support to appellant's contention in

that case than do the facts of the instant case give to appellees' contention here. The answer in that case asked affirmative relief, and after holding it sufficient as an answer the court then said that it had been treated as a counterclaim in the court below and proceeded to consider it from such standpoint. That appellant's contention in that case was the same as appellees' contention in the instant case will appear from the court's statement of the contention of the parties in that case which we quote from page 500: "It is very earnestly contended by the appellant [by appellees here], that the alleged surrender and cancellation of the defeasance, set up in the paragraph under consideration, did not in any manner divest the original contract between the parties of its mortgage character, and hence constituted no defense to his complaint, and that, for still stronger reasons, such surrender and cancellation did not make out a case for the *affirmative relief demanded in that paragraph*. Many of the authorities cited by him lay down abstract rules which would seem to support the positions thus assumed. But the appellee insists, that the surrender and cancellation of the defeasance, averred by him, constituted a new and binding contract between the parties, which superseded the original agreement, and which practically converted the deed from the appellant to him into an absolute conveyance in fee-simple." (Our italics.) So in that case, it was insisted by the appellant as it is insisted by appellees in this case, "that the deed and defeasance taken together constituted a mortgage," and that such deed being once a mortgage it always remained a mortgage. The court in that case on pages 500 and 501 disposed of these respective contentions as follows: "That the deed and defeasance, taken together, constituted only a mortgage from the

appellant to the appellee, is a proposition too well established to require the citation of authorities to sustain it. As to that there is no controversy between the parties here. But what effect, if any, did the surrender of the defeasance, for cancellation have on the original agreement between the parties, conceding it to have been surrendered in the manner and under the circumstances alleged by the appellee? In 2 Washburn, Real Property, p. 62, 4th ed., it is said: 'The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at the time of the execution of the deed, nor upon any contingency whatever. Equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan. *This does not preclude any subsequent bona fide agreement in respect to the estate between the parties; and where a mortgagor voluntarily cancelled the instrument of defeasance which he held, it gave to the deed which it was intended to defeat the effect of an original absolute conveyance as between the parties.*' " (Our italics.) Speaking further with reference to the maxim "once a mortgage always a mortgage" in that case the court on page 502 said: "it can not interfere with the right to foreclose, when the mortgage has become forfeited, *nor with any fresh contract which the mortgagor may choose to make with the mortgagee for a sale or relinquishment of the equity of redemption and the vesting the latter with an irredeemable estate.*' In Hillard on Real Property, p. 546, 4th ed., it is also said: 'Where a deed is given, accompanied by a defeasance, which is not recorded, a subsequent surrender and cancelling of such defeasance, by agreement, for the purpose of giving the grantee an absolute title, without unfairness between the parties

or as to strangers, and before any rights of creditors have intervened, will vest the absolute title in the grantee.' * * * After a careful review of the foregoing authorities, and of many others which we deem it unnecessary to specifically refer to here, we are of the opinion, that the surrender of the defeasance for cancellation, under the circumstances as alleged, *vested in the appellee an absolute title to and ownership in the lands in suit.*" (Our italics.)

As stated above the facts in the instant case are much stronger in appellant's favor than the facts presented by the answer in the case just quoted from. This is so because the averments in said answer clearly showed that the deed and so-called defeasance in that case constituted a mortgage in fact, while in the instant case the contemporaneous agreement purports upon its face to be an agreement of purchase and sale of the real estate involved, and an agreement on the part of the appellant and his cograntee named in the deed to convey to appellee Lemon such real estate upon his payment of the consideration named in such agreement according to the terms and provisions therein contained.

It is true, as appellees contend, that "the modern doctrine—settled in this State—is, that a mortgage is but a lien on the land as a security

3. for the debt, and the legal title remains in the mortgagor, subject to the lien of the mortgage." *Fletcher v. Holmes* (1870), 32 Ind. 497, 513. See, also, *Francis v. Porter* (1855), 7 Ind. 213; *Morton v. Noble* (1864), 22 Ind. 160; *Grable v. McCulloh* (1867), 27 Ind. 472; *Landers v. Beck* (1883), 92 Ind. 49, 51; §3957 Burns 1914, §2926 R. S. 1881. It

is also true that the agreement to cancel the
4. so-called defeasance was not a conveyance within the meaning of §3957, *supra*. Such concession, however, does not, as appellees seem to

think, dispose of the question here involved. Appellees seem to overlook the fact that appellant

2. offered in evidence a deed absolute on its face. This deed showed the legal title to be in appellant. It is true that the so-called defeasance was also offered in evidence, but this instrument was cancelled, and if the law be correctly stated in the case of *Wilson v. Carpenter, supra*, such cancellation, if *bona fide*, and for the purposes of the question under consideration such cancellation must be so treated, it gave the deed which it was intended to defeat "*the effect of an original absolute conveyance as between the parties*" and vested "*the absolute title in the grantee.*"

If, however, it should be conceded, as appellees in effect contend that where a deed, absolute on its face, is accompanied by a defeasance that such deed is rendered a mortgage, and that the cancellation of such defeasance could not change the original transaction and restore to the deed the *prima facie* effect of which it was robbed by such defeasance, their contention still remains subject to the infirmity that they assume that the agreement executed contemporaneous with the deed is a defeasance when in fact it is not a defeasance. On the contrary, it purports to be an agreement of purchase and sale of the real estate involved, and, in effect, binds the appellant and his cograntee to convey to appellee Thomas Lemon such real estate upon the full payment of the consideration therein expressed according to the terms and conditions therein provided. That the parties themselves treated and regarded such agreement between them as one of purchase and sale of the real estate in question and not as a defeasance is further evidenced by the language in the instrument of cancellation to the effect that the latter instrument was entered into for the follow-

ing purpose, viz., (we quote) "To settle all matters pertaining to forfeiture of contract of purchase entered into April 1, 1907." In speaking of an instrument similar to that here involved, but more favorable to appellee's contention, the Supreme Court in the case of *Ferguson v. Boyd*, *supra*, 542, 543, said: "The deed to Boyd was absolute, and the collateral instrument contained no provision making it void upon the performance of a condition. On the contrary, the provision of the latter instrument was that upon repayment the grantee would reconvey. *This did not constitute a technical defeasance*, although it was, no doubt, sufficient to secure to the grantor an equitable right of redemption. Blackstone says: 'A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone.' * * * There is little, if any, dissent from the proposition that in such a case as this the grantee has a legal estate." See, also, *Watkins v. Gregory* (1841), 6 Blackf. 113; *Flagg v. Mann* (1837), 2 Sumn. 486, Fed. Cas. No. 4,847; *Baird v. Kirtland* (1837), 8 Ohio *21; *Loring v. Melendy* (1842), 11 Ohio 355; *Kemper v. Campbell* (1886), 44 Ohio St. 210, 6 N. E. 566; *Knowles v. Knowles* (1903), 25 R. I. 464, 56 Atl. 775; *McCarthy v. McCarthy* (1869), 36 Conn. 177; *Williams v. Baker* (1901), 62 N. J. Eq. 563, 51 Atl. 201; *Fitch v. Miller* (1902), 200 Ill. 170, 65 N. E. 650; *Gallagher v. Giddings* (1891), 33 Neb. 222, 49 N. W. 1126; *Stall v. Jones* (1896), 47 Neb. 706, 66 N. W. 653; *First Nat. Bank v. Tighe* (1896), 49 Neb. 299, 68 N. W. 490; *Hughes v. Davis* (1870) 40 Cal. 117; *Marshall v. Williams* (1891), 21 Or. 268, 28 Pac. 137; 1 Blackstone, Comm. (Sharswood) 646 note; and see *Wilson v. Carpenter*, *supra*. The same case quotes

with approval the following language of Justice Story, in the case of *Flagg v. Mann*, *supra*, 541, "The present bond does not declare, that, if the condition is complied with the conveyance shall be utterly void. On the contrary, it is to remain in full validity, and a reconveyance of the title is to be made, which necessarily supposes, that, *until the reconveyance, the estate remains at law in the grantees.*" (Our italics.) In the case of *Kemper v. Campbell*, *supra*, where a deed absolute in form was intended as a security the court used the following language which is also quoted with approval by the Supreme Court in the case of *Ferguson v. Boyd*, *supra*: "It is not a proper mortgage. In equity it is construed to be such for the purpose of preventing imposition and injustice; *but at law it is simply what, on its face it purports to be, an absolute conveyance in fee simple.* *Hughes v. Davis* (1870), 40 Cal. 117; 1 Jones, Mortgages (6th ed.) §339. *And no other or different construction will be placed on the deed, unless necessary to accomplish the ends of justice.* 1 Jones, Mortgages (6th ed.) §321. To do otherwise would be foreign to the spirit of equity, and would violate the plainest principles upon which equity jurisprudence has always been administered by the courts. No one of the maxims of equity is of more unvarying application than that 'he who seeks equity must do equity.'" (Our italics.) To the same effect, see, *West v. Reed* (1870), 55 Ill. 242; *Hassam v. Barrett* (1874), 115 Mass. 256; *Marshall v. Williams*, *supra*; *Carpenter v. Carpenter* (1873), 70 Ill. 457; *Fitch v. Miller*, *supra*; *Baird v. Kirtland*, *supra*.

Appellees insist, in effect, that the cases, *supra*, are distinguishable from the instant case because equitable relief was asked and involved in those cases, whereas, in the instant case appellant bases

his action on a legal title. This distinction does not render the general propositions of law, announced in those cases and quoted and italicized, above, inapplicable to the instant case. It must be remembered that in the case at bar it is the appellees and not the appellant who must appeal to the equitable side of the court for relief. Appellant has a recorded deed which shows a fee simple title absolute in him and if this title can be changed or shown to be different from what it appears it must be by resort to equity. It was, therefore, the appellees, who were required to invoke the equity side of the court to change the character of the title, and when they ask the assistance of such a court they are confronted with their own voluntary good-faith cancellation and surrender of the instrument on which they must base their right to change such title, and a court of equity, which requires all persons who invoke its aid to come into court with clean hands, will not permit a party to ask and obtain the advantages of an instrument which he, in good faith has cancelled. In such a case if the cancellation of the instrument which made the deed a mortgage was voluntarily given, and in no way influenced by fraud or mistake of the parties, and no rights of third parties have intervened a court of equity will leave the title where it finds it, or, in other words, it will adopt that construction and effect which the parties themselves have voluntarily given to their transactions, and hence leave the legal title to the lands involved in the hands of the grantee of the deed which was sought to be declared a mortgage.

It is also insisted by appellees that the case of *Ferguson v. Boyd*, *supra*, is to some extent modified or distinguished in the case of *Sinclair v. Gunzenhauser* (1913), 179 Ind. 78, 98 N. E. 37, 53, 100 N. E. 376, and that the instant case is controlled by

the latter case. Appellees' contention is based on the following language used by the court in the latter case: "*Ferguson v. Boyd, supra*, is based upon consideration of equitable defenses, in the course of the presentation of which, attention is directed to the distinction between defeasances in collateral agreements which operate to defeat a title which has vested and agreements to reconvey, though in each the grantee has the legal title, and it is there said, dealing with the question of title, quoting from 1 Jones, Mortgages (6th ed.) §244. 'An absolute deed with a defeasance passes the legal title to the property even in states in which it is held that a mortgage in the usual form does not pass the title.' But it is clear that that rule does not obtain in this State, besides, in the same section, it is also said: 'At law, an absolute deed and a separate absolute defeasance or agreement to reconvey, executed at the same time, as security for a debt, amount to a mortgage.' And such is the prevailing rule. See note 15, §244, *supra*. Nor is it material that the defeasance be separate." If it can be said that this latter case in any way criticises or places any limitation on the language used by the court in the former case, it affects only what might be construed as an implied approval by the former case of the rule indicated in the quotation as the rule laid down by Jones on Mortgages, the court in the latter case saying that, "such rule does not obtain in this State." This limitation can afford appellees no relief in the instant case. The agreement in question does not purport to be a defeasance, nor is there anything appearing on the face of either the deed or the agreement standing alone, from which the court can say as a matter of law that the deed was in fact given to secure a debt, nor was there any other evidence introduced in the instant case necessitating

such an inference. In such respect the instant case is much stronger than either of the cases quoted from, *supra*.

It should be stated in this connection that appellees contend that appellant, in the trial of the cause, treated the agreement executed contemporaneous with the deed as a defeasance, and

5. that this court should hold him to the theory of the case adopted in the trial court. This contention of appellees is based on the statement made by appellant at the time he offered such agreement in evidence which statement is as follows: "We offer this contract as evidence of the fact that by its execution and delivery, which delivery we offer to prove, the first contract marked exhibit 'A' and introduced in evidence in this cause, the same being a defeasance executed concurrently with the deed in evidence from the defendants in this action to Raub and Yambert, was by this contract now offered in evidence cancelled and set aside and that by operation of this contract now offered in evidence, the deed from Lemon and wife to Raub and Yambert became an absolute deed and conveyance to Raub and Yambert, by virtue of which said Raub and Yambert took absolute title to the real estate described in the complaint." It is true, generally speaking, this court will hold a party to the theory of a case adopted in the trial court where such theory clearly appears from the record. *Southern R. Co. v. Crone* (1912), 51 Ind. App. 300, 99 N. E. 762; *Muncie, etc., Traction Co. v. Citizens Gas, etc., Co.* (1913), 179 Ind. 322, 100 N. E. 65. This court, however, will look to the entire record to ascertain the theory on which a case was tried below. The mere fact that appellant in identifying the instrument offered in evidence referred to it as a "defeasance" is not of controlling importance within the

meaning of the rule invoked by appellees. It follows we think that this case, as presented

2. by this appeal, is controlled by the cases of *Wilson v. Carpenter* and *Ferguson v. Boyd*, *supra*, and that, under them, the court erred in limiting the effect of said instrument of cancellation of the so-called defeasance and in giving the peremptory instruction in favor of appellees.

Before closing the opinion we deem it proper to say that it must not be understood from anything said herein that this court has foreclosed the question of the character of appellant's title, or the question of the effect of the cancellation of the so-called instrument of defeasance. It may be that, from the entire evidence in the case a court or jury might finally determine, and properly so, that the deed and contemporaneous agreement here involved were in fact executed to secure a loan obtained by appellees, and that such deed, though absolute on its face, is, in fact, a mortgage and that the agreement of cancellation herein referred to was tainted with fraud or some other infirmity which might render it of no effect and hence that appellant's title is in fact an equitable title. This appeal presents no such question and it was for the purposes of the questions presented by the appeal only that we treated the deed and so-called defeasance as being what they purport to be, and treated the cancellation of such defeasance as being fairly procured and voluntarily made in good faith.

The judgment below is reversed with instructions to the trial court to sustain appellant's motion for new trial, and with leave to appellant to file additional paragraphs of complaint, if he so desires, and for any other proceedings not inconsistent with this opinion.

NOTE.—Reported in 108 N. E. 631. As to the rule that the plain-

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tiff in ejectment must be entitled to the possession, see 116 Am. St. 569. On a deed as a mortgage, see L. R. A. 1916 B 18. See, also, under (1) 15 Cyc 115; (3) 27 Cyc 961; (5) 3 C. J. 718; 2 Cyc 670.

THE JOHN KINDLER COMPANY v. THE FIRST
NATIONAL BANK OF FOND DU LAC,
WISCONSIN.

[No. 8,611. Filed June 2, 1915. Rehearing denied December 9, 1915.
Transfer denied February 17, 1916.]

1. **BILLS AND NOTES.—Defenses.—Pleading.—Non Est Factum.**—In an action by the endorsee of a note, an answer in general denial, and a special paragraph to the effect that defendants executed a note to payee, but that when delivered it did not contain certain words, that such note was subsequently changed by the addition of such words without the knowledge or consent of defendants, and that defendants paid the payee without knowledge that the note had been changed or transferred, each being verified, had the force of a plea of *non est factum*. p. 81.
2. **BILLS AND NOTES.—Alteration.—Bona Fide Purchaser.—Evidence.—Verdict.—Conclusiveness.**—The fact that the place of payment, the rate of interest, and the time of the commencement of interest, are written in a note in different handwriting than that of the other written portions thereof, does not as a matter of law put a purchaser thereof on inquiry as to whether it has been altered; hence where there was evidence to show that after the execution and delivery of a note blank spaces therein were filled by the payee's agent pursuant to a general understanding with the maker, though without the latter's specific knowledge, so as to show the place of payment, the rate and time for commencement of interest, after which through a series of endorsements it reached plaintiff as a purchaser for value, a verdict for plaintiff was conclusive as against the objection that plaintiff was not a *bona fide* purchaser without notice. p. 82.
3. **BILLS AND NOTES.—Alteration.—Authority of Payee.—Rate of Interest.**—The payee of a promissory note may change the interest rate as expressed therein to make the note conform to what the parties agreed or intended it should have been, and such change will not amount to a material alteration. p. 86.
4. **BILLS AND NOTES.—Alteration.—Inserting Rate of Interest.—Effect.**—In view of the fact that under §7952 Burns 1914, §5200 R. S. 1881, a note without stipulation as to interest would draw interest at six per cent from maturity, the act of the payee in filling blank spaces therein to show that the note bears interest at such rate from maturity can not be deemed a material alteration. p. 86.

5. **ALTERATION OF INSTRUMENTS.**—*Material Alteration.*—The fact that the burden of the complaining party has not been enlarged is not necessarily the test of whether the alteration of an instrument was material, since if the legal effect of the instrument is thereby changed the alteration may be material notwithstanding the burden remains the same. (*Holthouse v. State* [1911], 49 Ind. App. 178, disapproved in part.) p. 87.
6. **BILLS AND NOTES.**—*Alteration.*—*Evidence.*—*Implied Authority.*—In an action on a note, claimed by defendant to have been altered by inserting the place of payment and the rate and time of commencement of interest, evidence showing that during a long course of dealing with payee the defendant of the executed notes containing blanks with reference to such provisions which blanks were later filled by payee, and that as such notes matured the defendant paid them without objection, etc., warranted the jury in finding that the payee had at least implied authority to fill such blanks in the note sued on. p. 87.
7. **BILLS AND NOTES.**—*Alteration.*—*Implied Authority.*—The authority of a payee to fill blank spaces in a note may be implied from circumstances and from facts proved. p. 89.

From Kosciusko Circuit Court; *Francis E. Bowser*, Judge.

Action by The First National Bank of Fond du Lac, Wisconsin, against The John Kindler Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

C. W. Watkins, R. A. Kaufman and C. A. Butler, for appellant.

Lesh & Lesh, Frank O. Switzer and Lemuel W. Royce, for appellee.

CALDWELL, J.—Action on a promissory note, brought by appellee as endorsee and holder against appellant as maker. It is alleged that The John Kindler Company is a partnership, and that Elizabeth Kindler is a member thereof. A copy of the note is exhibited with the complaint and is as follows:

“\$1,074.00. Anderson, Ind., Dec. 27, 1909.

June 1, 1910, after date we or either of us promise to pay to the order of the Anderson

Carriage Manufacturing Company Ten Hundred Seventy-Four 00/100 Dollars. Negotiable and payable at Citizens Bank of Anderson, Ind. Value received without relief whatever from valuation or appraisement laws, with interest at 6 per cent after maturity and attorney's fees. The drawers and endorsers severally waive presentment, protest, notice of protest and non-payment of this note.

John Kindler Company,
P. O. Huntington, Ind. Charles P. Kindler."

The first paragraph of answer is a verified general denial. The amended second paragraph is to the effect that appellant executed a note to

1. said payee, but that when signed and delivered, it did not contain the words "Citizens Bank of Anderson, Ind.," the word "maturity," or the figure "6" before the words "per cent"; that afterwards, and without the knowledge or consent of appellant, the note was changed by the addition of such elements; and that appellant paid the note to the payee without any knowledge that it had been changed or transferred. This paragraph also is verified. The first and second paragraphs have the force of *non est factum*. The amended third paragraph of answer amounts to a plea of payment to the carriage company without notice that the note had been transferred. The first paragraph of reply is a general denial to said second and third paragraphs of answer. The second paragraph of reply, directed to all three paragraphs, pleads in general terms the facts constituting appellee a good-faith holder for value, and in addition, is to the effect that when appellee purchased the note it contained the alleged omitted elements, and that they appeared in ordinary black ink and in appropriate blank spaces apparently intended for such elements, and

that it had no notice or knowledge that the note had been changed after its execution or of any fact or circumstance impairing its validity, or that there was any defense to it; that there was nothing of a suspicious character appearing on the face of the note, and that appellee believed in good faith when it purchased the note, that it had been executed in the form sued on.

A trial by jury resulted in a verdict and judgment for appellee. The errors assigned are that the court erred in overruling the motion for a new trial, and in overruling the demurrer to the second paragraph of reply. Under the first assignment, the sufficiency of the evidence and the action of the court in refusing certain instructions and in giving others is challenged.

The evidence, so far as material, is as follows: The note was given for carriages bought by appellant of the payee, The Anderson Carriage

2. Manufacturing Company. Charles P. Kindler whose authority is not questioned, acted for appellant, and N. A. Crawford, sales manager of the payee, acted for it in the transaction. The note was signed and delivered at the office of the carriage company. Crawford prepared it by using a printed blank. When signed and delivered, it was in form as exhibited except that after the printed words "negotiable and payable at" there was a long blank space, and a blank space after the printed words "with interest at" and also after the printed words "per cent after". Crawford placed the note in the payee's safe in such incomplete condition. Subsequently Berkshire, the payee's bookkeeper, filled in such blank spaces in the absence of appellant, and without any specific knowledge on its part that the same had been or was to be done, by inserting therein the words and figure complained of. The note was

then regularly negotiated by the payee, and after several endorsements came into the hands of appellee in due course, and under such circumstances as to constitute appellee a good-faith holder for value, except it be for the fact that a part of the written portion of the note appeared in the handwriting of Crawford and a part in the handwriting of Berkshire. Charles P. Kindler testified that there was an understanding that all notes given by appellant to the carriage company were to draw six per cent interest after maturity.

The argument is advanced that the fact that two handwritings appeared in the body of the note was sufficient to put appellee on inquiry in the purchase of the note, and therefore to undermine appellee's standing as a good-faith purchaser for value as it might otherwise exist. The evidence on this question was heard by the jury, and the note was submitted to them for inspection. The circumstances were such as to bring the question within the province of the jury as a question of fact, and it having determined it in appellee's favor, its finding is binding on us. In other respects the evidence tending to show that appellee was a good-faith purchaser for value was uncontradicted, and the jury having so found, we shall further consider the case from that viewpoint.

Bowen v. Laird (1906), 166 Ind. 421, 77 N. E. 852, is closely in point here. That case turns on the sufficiency of the reply to an answer of *non est factum*. The reply in that case admitted that the note when executed was not in the same condition as when sued on, and alleged that when executed it was as follows, omitting date and signature: "One year after day, I promise to pay to the order of Bernard & Hunter \$144, at _____ value received. Interest at 8 per cent per annum after

due until paid.” Further facts were averred respecting the filling of the blank in the note by the insertion of the name of a bank of this State, and respecting the circumstances under which the holder became the owner of the note, very similar to the facts shown by the evidence here, the chief difference being that it was alleged in said reply that the blank was filled in the same handwriting as that appearing in the other portions of the note. As we have indicated, the mere fact that the note involved in the case at bar contained the different handwritings could not, as matter of law, be held to constitute a suspicious circumstance disclosed by the face of the note, effective to destroy appellee’s claim of a good-faith holding for value. Rather the existence of such circumstance was evidentiary matter for the consideration of the jury. The fact that the jury considered it and determined the involved question in favor of appellee has the effect of removing the distinction that might otherwise exist between the Bowen case and the case at bar. The court, in the Bowen case, in holding the reply sufficient and that under the facts therein alleged the note was valid in the hands of a good-faith purchaser for value, reviews the authorities, and after stating that the insertion of the name of the bank constituted such a material alteration as to invalidate the note in the hands of the payee, for the reason that thereby the character of the instrument was changed, uses this further language, applicable here: “Appellee executed to Bernard & Hunter a perfect note, except when delivered it contained the word ‘at’ standing at the left end of a blank line and space extending across the paper. This space after the word was unscored and left blank, and appeared in the instrument as indicating an intention to fix the place of payment, but which had not been determined when the note was placed in the

hands of the payee. Without cancelation the word and line were meaningless upon any other theory. If the purpose had been to make the note payable wherever it might be found, when due, it could have been clearly accomplished only by marking out the word 'at' and the following line. In any aspect, appellee delivered his note with an uncanceled word and space which irresistibly suggested incompleteness in the instrument for want of the place of payment, and which made it easy to effect an alteration without exciting the suspicion of a reasonably cautious person." The Supreme Court in the Bowen case disposes of such cases as *McCoy v. Lockwood* (1880), 71 Ind. 319, *Cronkhite v. Nebeker* (1882), 81 Ind. 319, 42 Am. Rep. 127, cited by appellants, by applying a distinction expressed in the following language: "When a note is, before delivery, made complete in accordance with its general character, and is free from words and unscored blanks reasonably indicating incompleteness, the unauthorized addition of words or figures by the filling of unoccupied blanks or parts of blanks, or otherwise, is such an alteration, if material, as will make the paper void in the hands of the forger, or any one claiming under him." In each of those cases the note as executed bore on its face no evidence of incompleteness. In the Bowen case the court cites, among other decisions, as controlling under the circumstances presented there, *Marshall v. Drescher* (1879), 68 Ind. 359, and *Cason v. Grant County Deposit Bank* (1895), 97 Ky. 487, 31 S. W. 40, 53 Am. St. 418. The facts in each of these cases are very similar to those presented in the case at bar. In the Cason case the note when executed was in the following form: "Three months after date I promise to pay to the order of G. W. Siddons \$200, at _____ value received." In that

case, the holder subsequently filled the blank by inserting the name of a bank, and the court, after reviewing the authorities, held the note not thereby to have been invalidated in the hands of a good-faith purchaser for value.

It is true that in the Bowen case the only point involved is respecting the inserting of the name of a bank in the note. The reasoning however is

3. just as applicable to the other alleged alterations here which consisted in inserting the rate of interest and the word "maturity". But as to such additional matters, Charles P. Kindler testified as we have stated that there was an understanding between the parties that all notes executed by appellant to said payee should bear six per cent interest from maturity. It is expressly held by the Supreme Court that the payee of a promissory note may change the interest rate as expressed therein to make the note conform to what the parties thereto agreed or intended it should have been, and that such a change does not amount to a material alteration. *Osborn v. Hall* (1903), 160 Ind. 153, 66 N. E. 457. For a collection of cases *pro* and *con* on the question of the right to change a written contract merely to correct a mistake, and that the weight of authority is in harmony with *Osborn v. Hall*, *supra*, see note to *Merritt v. Dewey* (1905), 2 L. R. A. (N. S.) 217. Moreover, the note as executed would have drawn interest at six per cent from

4. maturity. \$7952 Burns 1914, \$5200 R. S. 1881; *Sanderson v. Trump Mfg. Co.* (1913), 180 Ind. 197, 102 N. E. 2. It follows that the insertion of the rate and the word maturity did not change the effect of the note, and the alteration in this respect was not material. 2 C. J. 1199 and notes; *Fry v. P. Bannon Sewer Pipe Co.* (1913), 179 Ind. 309, 320, 101 N. E. 10; *Holthouse v. State*, *ex rel.*

(1912), 49 Ind. App. 178, 184, 97 N. E. 130. Some language used in the concluding part of the

5. opinion in the case last cited respecting the test by which to determine whether a particular alteration is material was apparently inadvertently used, and being erroneous is disapproved. If the alteration is such as to transform the instrument so that it is not the same in legal effect as the instrument executed, the alteration may be material, even though the burden of the complaining party is not thereby enlarged. *Johnston v. May* (1881), 76 Ind. 293; *Coburn v. Webb* (1877), 56 Ind. 96, 26 Am. Rep. 15; 2 C. J. 1174 and notes.

The evidence sustains the verdict. A further consideration confirms us in such conclusion. Thus,

there was other evidence to the following
6. effect: Appellant, by Charles P. Kindler, had executed to the Anderson Carriage Manufacturing Company prior to the execution of the note in suit a large number of notes given for carriages purchased. In many instances these notes were forwarded to appellant and apparently executed partially in blank and returned by mail. Others were executed at the office of the payee. Crawford testified that at one time Charles P. Kindler in conversation with an officer of the carriage company directed that all notes given by appellants be made payable at the Citizens Bank of Anderson, Indiana, without regard to whether he gave specific instructions in any case. This evidence was contradicted, and were we permitted to weigh the evidence, it is possible that we should have doubts as to the preponderance on that question. Wheelock, who was secretary of the carriage company from its organization in 1899 until it went into the hands of a receiver in 1910, testified by deposition that John Kindler, father of Charles and form-

erly the active manager of The John Kindler Company, paid cash for the earlier purchases of carriages; that later notes were given, and that John Kindler directed that such notes be made payable at Anderson banks rather than Huntington banks, as he did not want the notes to pass through the latter banks; that after the death of John Kindler his son Charles became manager of the Kindler business, and continued the custom established by his father; that it was a frequent occurrence for Charles to execute notes to the carriage company for appellant, blank as to place of payment, rate of interest and when interest should commence, which blanks were afterwards filled by the payee, the notes negotiated, and thereafter paid in due course without objection. Appellant paid such notes by drawing checks payable to the carriage company, whereupon the carriage company took up the notes from whatever bank held them, and forwarded them to appellant. Such notes indicated by endorsements that they had been negotiated; that this method of transacting business was adopted in order that such notes might not pass through Huntington banks. A number of such notes that had been paid were introduced in evidence. All these notes, as appeared by their face, bore six per cent interest from maturity. In one the blank intended to indicate the place of payment had not been filled. Eleven of them showed that they were payable at Anderson banks and one of them at a Huntington bank. Sometime after the payment of the last named note, appellant wrote a letter to the carriage company, acknowledging the receipt of a note for execution, and in such letter directed that the notes be made payable at Anderson and, "that it would be more favorable with us, instead of them being paid through one of our banks." Charles P. Kindler testified that while he

executed to the carriage company for appellant a large number of notes, that none of such notes when he executed them indicated on their face that they were payable in bank, and that he did not direct that they be made payable in bank, and that he neither directly nor indirectly authorized any one to fill blanks to that effect. He admitted that all these notes, except one, executed by him blank as to place of payment came back to him in due course cancelled and showing on their face that such blanks had been filled, and on the back that they had been negotiated. He explained his apparently inconsistent position, however, by stating that he did not notice that such blanks had been filled or that the notes had been negotiated. This evidence is amply sufficient to warrant the jury in finding that the payee had at least implied authority to fill such blanks. *Marshall v. Drescher, supra*. "Such authority may be implied from circumstances and

7. from the facts proved, when these facts all taken together and fairly considered justify the inference. It is after all a mere question of assent, and assent by implication, when fairly and legally inferred is actual and effective assent as much so as when direct authority is shown by parol." 1 R. C. L. 1013. See, also, *Palacios v. Brasher* (1893), 18 Colo. 593, 34 Pac. 251, 36 Am. St. 305; *Hopps v. Savage* (1888), 1 L. R. A. 648, note.

It is apparent from our discussion of legal propositions in connection with our consideration of the evidence that the court did not err in overruling the demurrer to the second paragraph of reply.

Some question is made respecting certain instructions tendered by appellant and refused by the court, and also respecting certain instructions given by the court on its own motion. We would not feel

justified in extending this opinion by setting out such instructions and discussing them. It is sufficient to say that we have carefully considered the tendered instructions and also the instructions given by the court as to all questions raised concerning them, and from such consideration it is apparent that the jury was correctly and clearly instructed. Judgment affirmed.

NOTE.—Reported in 109 N. E. 66. As to law governing altered paper, see 4 Am. St. 25. As to implied authority to fill in blanks so as to complete signed instrument, see Ann. Cas. 1912 B 1010. See, also, under (1) 8 Cyc 155, 201; (2) 7 Cyc 950; (3) 7 Cyc 619-622; (4) 7 Cyc 620, 622; (5) 2 Cyc 180; (6) 2 C. J. 1289; 2 Cyc 252; (7) 2 C. J. 1243; 2 Cyc 159.

MORRISSEY v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 8,614. Filed November 4, 1915. Rehearing denied January 6, 1916. Transfer denied February 17, 1916.]

1. **RAILROADS.—Street Crossings.—Personal Injuries.—Complaint.**—A complaint against a railroad company for personal injuries, alleging that defendant was negligent in maintaining its track at an elevation above a street crossing, so that there had to be an incline in the board walk crossing the track and down to the sidewalk level, and in permitting an accumulation of ice from water and steam which escaped while engines received water from an adjacent standpipe, that such dangerous situation had existed through the winters for ten years and that defendant was advised of it and could have remedied it, but failed to do so, that plaintiff had occasion to cross the track frequently at such point, which was one of the principal streets of the city, that the plaintiff slipped on such ice and suffered severe and permanent injuries through no negligence of his own, and entirely through the negligence of defendant in so maintaining the crossing and so causing the ice to accumulate, did not show that plaintiff was guilty of negligence in attempting to cross, and was sufficient. p. 92.
2. **RAILROADS.—Street Crossings.—Duty to Make Safe.—Conformity to Street Grade.**—Under §5250 Burns 1914, Acts 1895 p. 233, it is the duty of railroad companies to keep their crossings in a safe condition for use by the traveling public, and they may be compelled by mandate to make their tracks conform to street grades and to construct crossings over their tracks. p. 98

Morrissey v. Cleveland, etc., R. Co.—61 Ind. App. 90.

3. **RAILROADS.—Street Crossings.—Personal Injuries.—Contributory Negligence.—Answers to Interrogatories.**—In an action against a railroad company for personal injuries to plaintiff who slipped and fell while attempting to pass over a board walk maintained by defendant over its track at a public street crossing, where the complaint charged negligence in maintaining the approach from the sidewalk to the crossing at a sharp incline and in permitting an accumulation of ice at such place, etc., a general verdict for plaintiff amounted to a finding that plaintiff was not guilty of contributory negligence in attempting to pass over such crossing, and answers by the jury to interrogatories, though showing that plaintiff had knowledge of the dangerous condition, were insufficient to sustain a judgment thereon notwithstanding the verdict, in the absence of a finding that plaintiff's attention was not diverted at the time. pp. 98, 99.
4. **APPEAL.—Answers to Interrogatories.—Scope of Review.**—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories the court on appeal will consider only the general verdict, the interrogatories and answers thereto, and the pleadings. p. 99.
5. **TRIAL.—Verdict.—Answers to Interrogatories.**—It is the duty of the trial court to sustain a motion for judgment on the jury's answers to interrogatories where they are in irreconcilable conflict with the general verdict. p. 99.
6. **MUNICIPAL CORPORATIONS.—Defective Streets.—Injury to Pedestrian.—Contributory Negligence.**—Though a pedestrian has knowledge of the dangerous or defective condition of a street, it is not negligence as a matter of law for him to use such street, unless the danger is so great as to preclude use by a person in the exercise of ordinary care. p. 99.
7. **APPEAL.—Review.—Disposition of Cause.—New Trial.**—Although there is no motion for a new trial in the record, the court on appeal will order a new trial if it appears that the ends of justice will thereby be best subserved. p. 101.

From Superior Court of Tippecanoe County;
Henry H. Vinton, Judge.

Action by James Morrissey against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Daniel P. Flanagan and Thompson & McAdams,
for appellant.

Dan W. Simms, Stuart, Hammond & Stuart, L. J.
Hackney and Frank L. Littleton, for appellee.

SHEA, C. J.—This action was brought by appellant to recover damages for an injury alleged to have been received in a fall on an ice covered sidewalk while passing over appellee's right of way. The jury returned a general verdict in favor of appellant for \$2,750, but the court below sustained appellee's motion for judgment on the facts found in answer to certain interrogatories submitted to the jury and rendered judgment in its favor.

The errors assigned and relied on by appellant for a reversal are the sustaining of this motion and the overruling of his motion for judgment in his favor upon the general verdict. Appellee assigns as cross error in this court the overruling of its demurrer to appellant's complaint. The substantial allegations of the complaint are as follows:

That appellee for the past ten years has operated a steam railroad through the city of Lafayette in Tippecanoe County, Indiana, and main-

1. tained in said city on December 14, 1910, in addition to its main track a switchyard, composed of sidetracks, turntable and a roundhouse; that a public highway known as Second Street and Wabash Avenue, following a general course of north and south, is located within the corporate limits of said city, which appellee's main track and sidetracks, running southeast and northwest, cross at right angles, the section south of appellee's right of way being known as Wabash Avenue, and that north thereof as Second Street; that cement sidewalks are maintained on either side of the highway for the use of pedestrians, and the walk on the west side extends from the intersection of South and Second Streets to the north line of appellee's right of way, then commencing at the south line of said right of way, it extends to the corporate limits of the city, From the cement on the north to the cement on the

south side of its right of way appellee constructed a board walk over its tracks and roadbed, thereby making a continuation of said walk; that appellee's south track was a sidetrack running northwest from the west line of said highway a distance of three hundred feet to appellee's roundhouse, and between the roundhouse and public highway appellee maintained a turntable which could be so arranged as to be a part of the south sidetrack, running into the roundhouse; that appellee's track and roadbed especially the south sidetrack at the point where same passed over the board walk was from eighteen to twenty inches above the level of the highway and cement walk, and in placing the board walk appellee continued same south of the south rail of its south sidetrack a distance of two feet, at which point it joined the cement; that on account of the location of the south track above the grade of the highway and cement walk appellee was compelled to and did place the boards on a sharp decline of eighteen inches from the south rail to the cement; that for some time previous to December 14, 1910, appellee maintained a standpipe which was in constant use day and night, for supplying its engines with water at such location upon its right of way north and west of the board walk, that an engine in running to the pipe on the south track could receive water therefrom, and while being so supplied with water, the tender of the engine stood over the planked walk where it sloped down and out towards the cement walk; that appellee frequently filled its tenders to overflowing which, in moving the engines away, would cause large quantities of water to be cast daily upon that part of the board walk constructed upon the sharp decline; that the engines standing upon the crossing while being supplied with water deposited large quantities of steam and water upon

said board walk, upon the sharp decline, and upon the cement walk immediately south of the board walk, so as to cause a pool of water to stand upon the cement walk which during cold weather would freeze, thereby creating and causing to remain upon the boards located on the sharp decline and on the cement walk a continuous sheet of ice, of all of which facts appellee had full knowledge for a sufficient length of time to have avoided the escaping of water from the tender and engines at said point, and in the exercise of ordinary care for the safety of the traveling public to have lowered its track and so arranged its roadbed as to conform with the grade of the street, and to place the board walk upon a level with the same, thus removing all elements of danger to pedestrians; that appellee could have placed its waterstand in such position from the highway as to have avoided the presence of steam and water being cast upon the board walk on the sharp decline, and it had full knowledge of the danger to the traveling public in permitting these conditions to exist; that appellant was engaged in work at a point north of the crossing and lived south of same, and his customary course of travel from his work to his home was along over the west sidewalk and board walk; that he started from his working place near six o'clock p. m. on December 14, 1910, on the west sidewalk, passed on the board walk and over same to a point immediately south of the south rail of appellee's south track, and started down the board walk on the sharp decline south of the track; that it was dark at the time, and while he proceeded carefully down the incline his feet slipped from under him on the ice on said decline and he was violently thrown upon said board walk and sidewalk, causing serious and permanent injury to his knee. It is charged that appellee was careless and negligent towards appel-

lant in maintaining its roadbed at the point at the height of from eighteen to twenty inches above the grade of the street, and in neglecting to maintain its roadbed and track at the crossing on a level with the grade of the public highway in such manner as to maintain a level footway over the track to the south boundary line of its right of way; in maintaining its board walk on the sharp decline, well knowing that by casting the water from its engines and tenders upon said boards there was present in the winter time and at all times during cold weather a sheet of ice upon said boards and on the sharp decline, and that the location of said boards on the decline and the presence of ice thereon made the crossing at that point extremely dangerous and unsafe for the use of the traveling public as a footway over its right of way; in suffering and permitting water to gather upon said boards on the sharp decline and to permit the same to freeze thereon at the time of the accident to appellee; in maintaining its board walk on the decline aforesaid, well knowing that the same was in constant use by the traveling public, and that by the presence of ice thereon, of which it had full knowledge, the walk was made dangerous for the use of pedestrians passing thereover; in maintaining its standpipe in such close proximity to the sidewalk with knowledge of its construction, as to cause water to escape from the engines upon the board walk, and of the escape of water from its tenders at said point; that it was careless and negligent in causing its tenders to overflow when being filled at said standpipe, thereby casting great quantities of water upon the board walk and the decline to appellant's injury; that the public highway at the point where it crossed appellee's road, is one of the principal highways in the city of Lafayette, and hundreds of people pass over the sidewalk daily, all of

which was well known to appellee; that the fall and injury to appellant's knee was without his fault, but was caused by and resulted from the careless and negligent acts of appellee.

In support of its assignment of cross error appellee contends that from the allegations of the complaint it is apparent that the place where appellant fell on the sidewalk was so plainly and palpably dangerous that a man of ordinary prudence, acting carefully and knowing its condition as did appellant, would not undertake to pass over it in the manner attempted by him, and where a defect in a sidewalk or street is so dangerous that a man of ordinary prudence would not attempt to pass over it, then, in the absence of some overwhelming necessity for him to do so, it is negligence to make the attempt. We do not believe the complaint is susceptible of the construction placed upon it by appellee's learned counsel. It charges specifically the various acts of negligence above set out and also contains the general charge that the injury was caused by said negligent acts, which makes the complaint amply sufficient when measured by the rule laid down in the case of *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. See, also, *Nickey v. Steuder* (1905), 164 Ind. 189, 73 N. E. 117; *Pittsburgh, etc., R. Co. v. Wilson* (1904), 161 Ind. 701, 66 N. E. 899; *Chicago, etc., R. Co. v. Barnes* (1905), 164 Ind. 143, 73 N. E. 91; *City of East Chicago v. Gilbert* (1915), 59 Ind. App. 613, 108 N. E. 29, 109 N. E. 404; *City of Terre Haute v. Lauda* (1915), 58 Ind. App. 480, 108 N. E. 392.

Having reached this conclusion with respect to the sufficiency of the complaint we need not consider the other question presented as to the effect of cross errors where the complaint is insufficient.

In answer to interrogatories the jury found the

facts as to the place where appellant's injury was sustained, and the surrounding circumstances to be substantially as set out in the complaint. In addition it is shown by said answers that the water cast upon the boards forming the decline remained and continued through the winter in cold weather for many years past, continuously to the time of appellant's injury, freezing on said boards, and that the general public used the west sidewalk extending over appellee's right of way during the winter, and when ice was freezing, irrespective of the fact that there was such ice upon the decline; that the ice was an inch thick; that the ground at the foot of the stand-pipe was from ten to twelve inches lower than the rails of its west track; that for six or seven years previous to December 14, 1910, appellant passed over said crossing on an average of two times a day, and on the day in question had passed over it three times before meeting with the accident complained of; that at all times he passed over the plank or board walk and for a period of two weeks previous to the accident the descent or decline was covered with ice, which was plain and visible to one going or about to go over same in the daytime; that appellant was familiar with the location and condition of the plank and board walk and the accident occurred about 6:20 p. m.; that it was dark at the time, appellant carried no light, and there were no lights present to guide and direct him over the ice on said walk at the time of his injury; that at the time of the accident, and while crossing over the board or plank walk, there was no defect or danger on the walk or the inclined portion thereof which was not known to appellant, and there were no dangers at the place except the descent or decline in the plank walk and the ice thereon; that the traveling public had used

the board walk forming the decline as a part of the west sidewalk of the public highway for ten years, and there was no other public highway extending north and southwest of the crossing in question by which the traveling public living south and west thereof could come to the main portion of the city of Lafayette.

Appellee insists that it was not negligence to fail to have the grade of its tracks conform to the grade of the street. Section 5250 Burns

2. 1914, Acts 1895 p. 233 in force since March 11, 1895, reads as follows: "That it shall be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue or alley in any incorporated town or city in the state of Indiana; which said street, avenue or alley has been, or shall hereafter be, by addition, plat or otherwise dedicated to the public use, to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing." Railroad companies are, therefore, required to keep their crossings in a safe condition for use by the traveling public. *Chicago, etc., R. Co. v. State, ex rel.* (1902), 159 Ind. 237, 64 N. E. 860; *Chicago, etc., R. Co. v. State, ex rel.* (1902), 158 Ind. 189, 63 N. E. 224; *Vandalia R. Co. v. State, ex rel.* (1906), 166 Ind. 219, 76 N. E. 980, 117 Am. St. 370; Elliott, Roads and Sts. (2d ed.) §778. They may be compelled by mandate to make their tracks conform to street grades and to construct crossings over their tracks. *Chicago, etc., R. Co. v. State, ex rel., supra*, 237; *Vandalia R. Co. v. State, ex rel., supra*.
3. It is specifically charged in the complaint that it was negligence to maintain the approach

to the crossing on an incline of eighteen to twenty inches, upon which ice was permitted to accumulate

It is very earnestly argued that the answers to the interrogatories show that appellant was guilty of contributory negligence in using said street when he had knowledge of its dangerous condition, having passed over it at other times during the same day and for some days prior thereto, during which time the ice was upon said street. It is well settled that in considering this question it is the duty of this

4. court to take into account only the general verdict, the interrogatories and answers thereto, together with the pleadings. *American Car, etc., Co. v. Adams* (1912), 178 Ind. 607, 614, 99 N. E. 993; *Meyers v. Winona, etc., R. Co.* (1915), 58 Ind. App. 516, 106 N. E. 377; *Ittenbach v. Thomas* (1911), 48 Ind. App. 420, 426, 96 N. E. 21.

If when so considered there is an irreconcilable conflict between the facts found in answer to interrogatories and general verdict, it was the

5. duty of the trial court to enter judgment on the answers, and it is the duty of this court to sustain it. The general verdict finds that appellant in this case was not guilty of contributory

3. negligence. The rule is well settled that where a pedestrian has knowledge of the dangerous or defective condition of the street, it is not negligence as a matter of law to use said street, where it is not so dangerous as to preclude

6. its use on that account by a person in the use of ordinary care. Our latest and best reasoned cases support this doctrine. *Cochran v. Town of Shirley* (1909), 43 Ind. App. 453, 87 N. E. 993; *City of Indianapolis v. Mullaly* (1906), 38 Ind. App. 125, 77 N. E. 1132; *City of Valparaiso v. Schwerdt* (1907), 40 Ind. App. 608, 82 N. E. 923; *City of Bluffton v. McAfee* (1899), 23 Ind. App. 112,

53 N. E. 1058; *Citizens St. R. Co. v. Sutton* (1897), 148 Ind. 169, 46 N. E. 462, 47 N. E. 462; *Nave v. Flack* (1883), 90 Ind. 205, 46 Am. Rep. 205; *Town of Newcastle v. Mullen* (1909), 43 Ind. App. 280, 87 N. E. 146; *City of East Chicago v. Gilbert, supra*; *City of Terre Haute v. Lauda, supra*; *Williams v. City of New York* (1915), 214 N. Y. 259, 108 N. E. 448; *Bailey v. City of Cambridge* (1899), 174 Mass. 188; *Navarre v. City of Benton Harbor* (1901), 126 Mich. 618, 86 N. W. 138; *Morris v. Village of Saratoga Springs* (1900), 55 App. Div. 263, 66 N. Y. Supp. 821; *Nebraska City v. Rathbone* (1886), 20 Neb. 288, 29 N. W. 920.

In the case of *City of East Chicago v. Gilbert, supra*, the court uses this language: "The responsibility of keeping in mind a known defect or obstruction in a street or sidewalk does not rest on the traveler with the same degree of intensity as on the municipality. * * * It would, therefore, seem to follow that a defect in a street or sidewalk might be of such a nature that a traveler, with prior knowledge of its existence, might momentarily forget there was such a defect without being chargeable with a want of due care, while the municipality, by reason of such duty resting on it, and a negligent failure to perform the same, might be held liable for an injury resulting therefrom." There is no finding that the attention of appellant was not momentarily diverted.

The case of *Williams v. City of New York, supra*, lays down the proposition that it is a question for the jury as to whether the injured party is guilty of contributory negligence where it appeared that he slipped on an icy sidewalk. This is amply sustained by our own authorities. *City of East Chicago v. Gilbert, supra*; *City of Terre Haute v. Lauda, supra*. In this case in addition to the negligence charged in

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permitting the ice to accumulate and remain on the street, it is also found that there was an incline in the sidewalk of from six to eight inches. Adhering to this view of the law, we conclude that the trial court erred in rendering judgment on the answers to the interrogatories. While there is no motion for a new trial in the record, this court believes that the

7. ends of justice will be best subserved by ordering a new trial. *Meyers v. Winona, etc., R. Co., supra*; *Childress v. Lake Erie, etc., R. Co.* (1914), 182 Ind. 251, 259, 105 N. E. 467; *Inland Steel Co. v. Kiessling* (1910), 174 Ind. 630, 634, 91 N. E. 1084. Judgment reversed.

NOTE.—Reported in 110 N. E. 105. As to the duty of a railroad company to persons on or near to its track, see 20 Am. St. 452. As to duty of railroad to conform its crossing to a change of grade of street, see L. R. A. 1915 B 766. See, also, under (1) 33 Cyc 1056, 1060; (2) 33 Cyc 273, 281; (3) 33 Cyc 1142; (4) 38 Cyc 1930; (5) 38 Cyc 1927; (6) 28 Cyc 1422; (7) 3 Cyc 454.

THOMAS v. THOMAS.

[No. 9,345. Filed October 7, 1915. Rehearing denied February 3, 1916. Transfer denied February 17, 1916.]

APPEAL.—*Time for Perfecting.*—*Effect of Motion to Modify Judgment.*

—Under §672 Burns 1914, Acts 1913 p. 65, providing that appeals must be taken within one hundred and eighty days from the time the judgment is rendered, the pendency of a motion to modify the judgment does not operate to extend the time for taking an appeal.

From Porter Circuit Court; A. D. Bartholomew, Judge.

Action by Florence Glover Thomas against Eugene H. Thomas. From a judgment for defendant, the plaintiff appeals. *Appeal dismissed.*

Otto J. Bruce and W. Vincent Youkey, for appellant.

J. A. Gavit, and R. C. Martin, for appellee.

FELT, J.—Appellee moves to dismiss this appeal on the ground that the appeal was not perfected within 180 days from the time the judgment was rendered. The case was a suit for support, in which judgment was rendered for appellee on March 28, 1914. On the same day appellant filed her motion for a new trial and it was overruled. Thereupon, on the same day, appellant filed a motion to modify the judgment so as to provide a reasonable allowance for the support of herself and infant child. On June 28, 1915, at a subsequent term of the court, appellant filed a supplemental motion to modify the judgment to secure such allowance, and the court on that day overruled the motion to modify the judgment and the motion to modify was by order of the court made a part of the record without bill of exceptions. The transcript of the proceedings was filed in the office of the clerk of this court on July 23, 1915.

If the appeal should have been perfected within 180 days from the time the motion for a new trial was overruled the motion to dismiss must be sustained for the transcript was not filed in this court until more than a year after that time. Appellant concedes this to be the general rule, but claims that the final judgment, within the meaning of our statute authorizing appeals, was not rendered until the motion to modify the judgment was overruled by the court. The statute (§672 Burns 1914, Acts 1913 p. 65) provides that appeals "must be taken within one hundred and eighty days from the time the judgment is rendered." In speaking of this statute before amendment—changing the time from one year to 180 days—our Supreme Court in *Blair v. Barnes* (1910), 173 Ind. 657, 658, 659, 91 N. E. 232, said: "It has been held by this court, however, under said statute, that when the motion for a new trial is filed after the judgment is ren-

dered, but within the time allowed by law, that an appeal may be taken under said section within one year from the time judgment overruling the motion for a new trial is rendered. *New York, etc., R. Co. v. Doane* (1886), 105 Ind. 92 [4 N. E. 419]; *Colchen v. Ninde* (1889), 120 Ind. 88 [22 N. E. 94]. Other motions will not have the effect of postponing the time for taking the appeal. Ewbank's Manual (2d ed.) §101; *Joyce v. Dickey* (1885), 104 Ind. 183 [3 N. E. 252].” In 3 C. J. 1054, §1051, it is said: “In some jurisdictions the pendency of a motion to vacate and set aside or modify a judgment is held to suspend the operation of the judgment, so that it does not take final effect for the purpose of an appeal or writ of error until the motion has been disposed of. The general rule, however, is that the pendency of a motion to vacate or modify a judgment or order does not relieve one from the statutory requirement to appeal within the prescribed time.”

There are numerous decisions to the effect that a party appealing must bring his appeal within the provisions of the statute authorizing the appeal. There is no final judgment within the meaning of our statute until a pending motion for a new trial is overruled. If sustained it has the effect of vacating a judgment previously rendered. A motion for a new trial is not a collateral one but is one directly connected with the judgment and in this respect differs from many other motions. As to collateral motions the party desiring to appeal is charged with the responsibility of seeing that they are ruled on within the time allowed for an appeal if he desires to obtain any benefit therefrom on appeal. He may not depend on the pendency of such motions to extend the time fixed by the statute for taking an appeal. *New York, etc., R. Co. v. Doane, supra*; *Colchen v. Ninde, supra*. As supporting our conclusion that the

appeal must be dismissed, see, also, 3 C. J. 1054 and cases cited in notes; 2 Cyc 793-797; *Flory v. Wilson* (1882), 83 Ind. 391; *Brown v. Brown* (1907), 168 Ind. 654, 80 N. E. 535; *Brady v. Garrison* (1912), 178 Ind. 459, 461, 99 N. E. 738; *Elwbank's Manual* (2d ed.) §101 and cases cited. The motion to dismiss the appeal is sustained. Appeal dismissed.

NOTE.—Reported in 110 N. E. 573. As to computation of time of appeal or writ of error as affected by motion for new trial or rehearing, see 3 Ann. Cas. 630.

CRAIG ET AL. v. NORWOOD, ADMINISTRATOR.

[No. 8,589. Filed March 3, 1915. Rehearing denied June 25, 1915. Transfer denied February 17, 1916.]

1. COSTS.—*Stay of Subsequent Action Until Payment*.—The rule that while the costs of a dismissed action remain unpaid the commencement of a subsequent action for the same thing will be deemed vexatious, and will be stayed on proper application until the costs of the former action have been paid, does not apply where plaintiff shows affirmatively that the subsequent action is brought in good faith. p. 108.
2. APPEAL.—*Judgments Appealable*.—*Order on Application to Stay Proceedings*.—The ruling of the trial court on an application to stay proceedings for nonpayment of the costs of a former suit is not a final judgment from which an appeal may be taken. p. 108.
3. COSTS.—*Stay of Subsequent Action Until Payment*.—*Discretion of Court*.—An application to stay proceedings for nonpayment of the costs in a former suit is addressed to the sound discretion of the trial court, and its action will be reviewed when an abuse of such discretion appears. p. 109.
4. COSTS.—*Stay of Subsequent Action Until Payment*.—*Discretion of Court*.—In view of the constitutional provisions that the courts shall be open to every man and that justice shall be administered freely, a party may bring and prosecute his action to final judgment regardless of the number of actions he has previously brought for the same cause of action, unless it appears that he is simply bringing such actions to harass and annoy, or that they are vexatious and without merit, and therefore an abuse of the court's discretion in refusing to stay proceedings until payment of costs is not conclusively shown merely by the fact that plaintiff had brought two prior actions for the same thing in which the costs were unpaid. p. 109.

5. **COSTS.**—*Stay of Subsequent Action Until Payment.*—The exercise of authority to stay proceedings for nonpayment of the costs of a prior suit should be governed by the facts and circumstances of each case, and a stay should never be granted unless it appears to the court that the subsequent suit is without merit and vexatious. p. 109.
6. **APPEAL.**—*Review.*—*Stay of Proceedings.*—The court on appeal indulges the presumption that the trial court's action in refusing to stay proceedings until payment of the costs of prior suits was proper, and will not reverse the judgment on the ground that such action was an abuse of discretion unless such an abuse is clearly and unequivocally shown. p. 110.
7. **APPEAL.**—*Issues of Fact.*—*Conflicting Affidavits.*—*Conclusiveness of Finding.*—An issue of fact determined by the trial court on conflicting affidavits is conclusive on appeal. p. 110.
8. **EXECUTORS AND ADMINISTRATORS.**—*Necessity of Administration.*—On the death of an intestate leaving no widow and having no debts, and there is nothing to be done by way of administration of the estate except to divide it among the heirs at law, such heirs may settle the estate without an administrator, and they may resist the appointment of one or procure the removal of one who has been appointed. p. 111.
9. **DESCENT AND DISTRIBUTION.**—*Rights of Heirs to Settle Estate.*—*Action by Heirs.*—Where an intestate dies under circumstances making administration on his estate unnecessary, and none is had, the heirs at law may sue in their individual names to recover a demand due decedent in his lifetime, but they must allege and prove that there is no administration pending, since so long as there is an administrator he is entitled to recover all debts due the estate. p. 111.
10. **EXECUTORS AND ADMINISTRATORS.**—*Right to Sue.*—The right of an administrator to sue can be questioned only by a plea in abatement. p. 111.
11. **EXECUTORS AND ADMINISTRATORS.**—*Powers of Administrators.*—*Right to Sue.*—Administrators possess the same rights and powers with respect to the personal estate as the decedent had in his lifetime, and they can maintain actions for trespass or injuries committed either before or after the decedent's death, and have full authority to prosecute any suit which he might have prosecuted in his lifetime, and they alone are authorized to bring an action for the conversion of personal property owned by the decedent at the time of his death; hence an action charging defendants with conspiring to fraudulently procure the money and property of a decedent and with having fraudulently converted the same to their own use, was properly brought by the administrator. p. 112.
12. **EXECUTORS AND ADMINISTRATORS.**—*Recovery of Property.*—*Complaint.*—*Sufficiency.*—A complaint by an administrator for the recovery of the property of his intestate, alleging that the intestate

was enfeebled in body and mind by age, that defendants knowing his infirmity conspired to obtain fraudulently for themselves all his property, that they induced him to sell his real estate, and that they converted notes and bank accounts aggregating a specified sum, out of which they distributed a portion to certain heirs and converted the balance to their own use, etc., stated a cause of action. p. 112.

13. PLEADING.—*Answer.*—*Sufficiency.*—A paragraph of answer to be good as against demurrer for want of facts must fully answer the complaint or so much of it as it purports to answer. p. 114.
14. CONSPIRACY.—*Civil Liability.*—*Evidence.*—In a civil action charging conspiracy positive evidence of a conspiracy is not essential, but the evidence will sustain the charge if when considered in its entirety it furnishes reasonable grounds to infer the essential facts. p. 114.
15. WITNESSES.—*Competency.*—*Transactions With Deceased Person.*—“*Party.*”—Under §§519, 521 Burns 1914, §§496, 498 R. S. 1881, relating to the competency of witnesses, and providing that, where an administrator is a party to an action involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be rendered for or against the estate, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a witness as to such matters against such estate, the word “party” means a party to the issue and not merely a party to the record, and to be incompetent as a witness such party must have an interest adverse to the estate; so that in the absence of any showing that persons, though nominally parties, are necessary parties to the issue or record in an administrator’s action, or that they have any interest adverse to the estate, it is error to refuse to permit them to testify. p. 115.
16. WITNESSES.—*Competency.*—*Transactions with Deceased Persons.*—*Waiver.*—Where an administrator suing to recover property belonging to the estate, obtained by defendants through a conspiracy and converted by them, called, on the trial of a prior action for the same cause, a party as a witness and compelled him to testify, and also required him to answer written interrogatories, he waived the incompetency of the party to testify in the subsequent action under §526 Burns 1914, §502 R. S. 1881. p. 116.

From Hendricks Circuit Court; *James L. Clark*, Special Judge.

Action by James A. Norwood, administrator *de bonis non* of the estate of Joseph Peggs, deceased, against James A. Craig and others. From a judgment for plaintiff, certain defendants appeal. *Reversed.*

Charles A. Dryer and Thad. S. Adams, for appellants.

Charles F. Remy and James M. Berryhill, for appellee.

IBACH J.—Appellee brought this action against a large number of defendants, all of whom were discharged from all liability by the instructions of the court except Mary A. Myers, James A. Craig and Oliver L. Means, as executors of the last will and testament of Margaret F. McGregor, deceased, who were substituted as defendants in her stead upon her death, and James A. Craig, to whom Joseph Peggs executed a power of attorney for the transaction of his business about March 8, 1905. Two suits were previously brought, one by a former administrator, and were dismissed or otherwise disposed of before proceeding to judgment. The complaint in the present action originally embraced several paragraphs, which were disposed of by demurrer, or dismissed, except the fifth and sixth. These paragraphs, together with the supplemental complaint substituting the executors of the will of Margaret McGregor, after her death, formed the complaint upon which the cause proceeded to final judgment.

The fifth paragraph of complaint charges that defendants Mary A. Myers, Margaret McGregor, and James A. Craig entered into a conspiracy to wrongfully and fraudulently procure for themselves, their children, and other named parties defendant, all the money and property of Joseph Peggs, and in furtherance of that conspiracy procured the appointment of Craig as attorney in fact for Peggs to transact all of his business, and fraudulently converted it to their own use. The sixth paragraph alleges in substance all that is contained in the fifth with the additional charge that Joseph Peggs was at the

time and for two years prior thereto a person of unsound mind, and was so well known to be.

Appellants filed a verified motion to stay proceedings until the costs of the two preceding actions between the same parties and for the same cause had been paid. The overruling of this motion presents the first alleged error. Appellants then filed separate and several demurrers to each paragraph of complaint, which were also overruled, and exceptions saved. The answer was in three paragraphs, the first a general denial, and the second and third, which set up affirmative matter, were held insufficient on demurrer. The cause was tried by jury, and a verdict was returned in favor of appellee for \$4,500. Appellee over the objection of appellants remitted \$600 and over a motion for new trial, judgment was entered for \$3,900 on the verdict. Each of the aforesaid rulings is assigned as error by the appellants in this court. We will proceed to consider them in their proper order.

As a general rule, while the costs of a dismissed action remain unpaid, the commencement of a subsequent suit for the same subject-matter will

1. be presumed to be vexatious, and will as a general rule be stayed by the court, upon proper application, until the costs occasioned by the former suit are paid. An exception to this general rule arises, however, where the plaintiff shows affirmatively that the subsequent suit is not vexatious, but is excusable, and is brought in good faith. *Wait v. Westfall* (1904), 161 Ind. 648, 651, 68 N. E. 271, and authorities there cited. The

- rulings of the trial court on an application to
2. stay proceedings for the nonpayment of the costs of a former suit, do not constitute a final judgment from which an appeal may be taken; on the contrary, such an application is addressed

- to the sound discretion of the trial court, and
3. its action is subject to review by this court when an abuse of that discretion appears. *Trogon v. Brinegar* (1901), 26 Ind. App. 441, 59 N. E. 1066, and cases cited. Appellant contends that a second action between the same parties
 4. for the same cause, without paying costs of the former suit is presumably vexatious, and that the bringing of the same suit for a third time would be conclusively vexatious, and that the question under such circumstances would not be one in which the discretion of the trial court was to be exercised, but that such third suit would of necessity abate. We know of no authority on which such a claim could properly rest. The number of times a party has sought to litigate a cause in court will not of itself determine conclusively his rights. The Bill of Rights in our State Constitution guarantees that the courts shall be open to every man for injury done him and he shall have remedy by due course of law; "justice shall be administered freely and without purchase, completely and without denial; speedily and without delay." Under the provisions of our organic law a party has the right to bring and prosecute his action to final judgment regardless of the number of suits he has previously brought, unless it appears that he is simply bringing such actions to harass and annoy, or that they are vexatious and without merit. It seems to us that when such applications are presented to the trial court, the question is not simply the number of times a suit has been brought, or whether the parties are at all times the same, but whether the action has in fact been brought in good faith, or whether it is vexatious and without merit. No fixed rule
 5. can be established to govern in all cases, but rather the facts and circumstances of each

particular case must govern, but in no case should an application to stay proceedings be granted unless it appears to the court, in the light of all the surrounding circumstances, that the subsequent suit is without merit and vexatious. *Eigenmann v. Eastin* (1897), 17 Ind. App. 580, 45 N. E. 795, and cases cited.

The presumption is that the trial court in refusing appellants' application in the case was not influenced or actuated by any improper

6. motive, and did no wrong, so that before this court will reverse a judgment of the trial court on account of an abuse of legal discretion, it must appear clearly and unequivocally that such court has abused its discretionary powers. *Elliott*, App. Proc. §604; *Mead v. Burk* (1901), 156 Ind. 577, 60 N. E. 338. It will also be observed that the first suit was brought by a former administrator and the second by the present administrator, in their representative capacities, and the statute authorizing them so to do specially exempted them from personal liability for costs. §2808 Burns 1914, §2291 R. S. 1881. It would unnecessarily prolong this opinion to set out the verified application and the counter affidavits by the parties. It is sufficient to say that there was some evidence on which this ruling of the court can be sustained. An issue

7. of fact determined by the trial court on conflicting affidavits is conclusive on this court. *Conrad v. State* (1896), 144 Ind. 290, 295, 43 N. E. 221. There was no error in the ruling of the trial court on this application.

This action was instituted January 25, 1910. The act of 1911 (Acts 1911 p. 415, §344 Burns 1914), cited by appellee, requiring demurrers on the ground of insufficiency of facts to state a cause of action to be accompanied by a memorandum, showing in what

respects the pleading is insufficient, does not apply, because it is expressly provided in that act that it shall not apply to litigation pending at the time the act took effect.

There can be no doubt, when a person dies intestate, without leaving a widow and there is no indebtedness and there is nothing to be done by

8. way of administration of the estate but the division of it among the heirs, that such heirs at law may settle the estate without an administrator and they may resist the appointment of one, or may bring suit to set aside the appointment,

9. if one is made, and thereby remove him.

Block v. Butt (1908), 41 Ind. App. 487, 84 N. E. 357. Also, the heirs, under such circumstances, and where there is no administrator have the right to sue in their individual names to recover a demand due decedent in his lifetime. This, however, is the exception to the general rule. *Brunson v. Henry* (1894), 140 Ind. 455, 39 N. E. 256; *Buchanan v. Buchanan* (1909), 22 L. R. A. (N. S.) 454, and extended note. It is necessary in such cases to allege and prove that there is no administration pending and no administrator. *Magel v. Milligan* (1898), 150 Ind. 582, 50 N. E. 564, 65 Am. St. 382. So long as there is an administrator he is entitled to recover all debts due the estate, the claims of creditors being superior to the rights of heirs. *Hall v. Brownlee* (1902), 28 Ind. App. 178, 62 N. E. 457. The right of an administrator to sue can only be questioned by a plea in abatement. *Michigan*

Trust Co. v. Probasco (1902), 29 Ind. App.

10. 109, 63 N. E. 255; *Hansford v. Van Auken* (1881), 79 Ind. 157; *McDowell v. North* (1900), 24 Ind. App. 435, 55 N. E. 789; §2810 Burns 1914, §2292 R. S. 1881. The statute gives an

administrator full power to maintain any
11. suit in any court of competent jurisdiction in his name as administrator "for any demand of whatever nature due the decedent in his lifetime." §2808 Burns 1914, *supra*. Administrators possess the same rights and powers with respect to the personal estate as the decedent in his lifetime. They can maintain actions for trespass or injuries committed either before or after the decedent's death, and have full authority to prosecute any suit which the ancestor could have prosecuted in his lifetime. *Smith v. Dodds* (1871), 35 Ind. 452. In this State an executor or administrator alone can bring an action for conversion of personal property owned by the decedent at the time of his death. *Humphrey v. Davis* (1885), 100 Ind. 369, 371; *Douglass v. McCarer* (1881), 80 Ind. 91. The administrator was the proper party to bring this suit.

The material averments of the fifth paragraph of the complaint are that Joseph Peggs died November 16, 1905, aged ninety-eight. For some

12. years prior to his death he was almost blind, and was enfeebled both in body and mind, had become very childish, and was easily influenced by those who associated with him much of the time, especially by those with whom he sustained confidential relations. In November, 1904, he was the owner of fifty-eight acres of land, some notes aggregating in amount \$2,000 and about \$2,000 on deposit in bank. About that time James A. Craig, Margaret McGregor and Mary A. Myers, knowing his infirm and feeble condition, conspired together to wrongfully and fraudulently obtain for themselves all such property, and in furtherance of that plan they took him from his established home and kept him in their own homes, surrounded only by their own families and special friends. Some three

or four months thereafter they induced him to sell his land for about \$6,000 and Craig was appointed his attorney in fact to transact all his business for him and he continued so to act until the time of the death of decedent. After such appointment in furtherance of their fraudulent design, Craig converted all of the property of said Peggs into cash, amounting in all to \$9,000. Of this sum \$2,500 was distributed among certain heirs and relatives of decedent during his lifetime, and the balance in the consummation of their fraudulent scheme was converted and appropriated to their own use. They have ever since wrongfully retained said sum of money and have refused to surrender the same to appellee, although demanded so to do.

The averments of the sixth paragraph are in most respects the same, except it contains the additional averment that Joseph Peggs was of unsound mind for two years prior to his death and during all the time the conspiracy was being carried out, and appellants knew of his infirmity and with that knowledge conspired to and did reduce all his property to cash and converted it to their own use.

Appellants insist the complaint is bad because no value is alleged to the notes and bank account. Conversion of the notes and bank account is not charged; it is the proceeds thereof, and it is alleged that the notes aggregated the sum of \$2,000, and the bank deposits \$2,000. The fifth paragraph charges that in furtherance of the conspiracy Craig wrongfully and fraudulently converted the remaining \$7,500 from the estate to his own use and benefit, and to the use and benefit of his codefendants, also that Mrs. McGregor and Mrs. Myers engaged in the conspiracy by which the fraud was committed. Each paragraph of the complaint is sufficient. *Harlan v. Brown* (1892), 4 Ind. App. 319, 30 N. E. 928;

Breedlove v. Bundy (1884), 96 Ind. 319; *Louisville, etc., R. Co. v. Balch* (1886), 105 Ind. 93, 4 N. E. 288.

There was no error in refusing to strike out part of the sixth paragraph of complaint. *Lewis v. Godman* (1891), 129 Ind. 359, 27 N. E. 563; *Lake Erie, etc., R. Co. v. Juday* (1898), 19 Ind. App. 436, 49 N. E. 843. Neither was there error in sustaining the separate and several demurrers to the

13. separate paragraphs of answer as such answers did not contain facts which constituted a defense to either paragraph of the complaint. A paragraph of answer to be good as against demurrer for want of facts must fully answer the complaint or so much of it as it purports to answer. *Raley v. Evansville Gas, etc., Co.* (1910), 45 Ind. App. 649, 90 N. E. 783, 91 N. E. 571; *McKnight v. Kingsley* (1911), 48 Ind. App. 372, 92 N. E. 743; *Wilson v. Fahnestock* (1909), 44 Ind. App. 35, 86 N. E. 1037.

In view of the disposition which we are required to make of this appeal, it is not necessary for us to consider the assignment that the verdict of

14. the jury is not sustained by sufficient evidence. In this connection it is proper to state, however, that it is not necessary that there should be positive evidence of a conspiracy. It is sufficient if the circumstances show that the defendants engaged in the joint undertaking or purpose to commit a wrong. In other words, in civil cases, the evidence will be held to be sufficient if, when considered in its entirety, it will furnish reasonable grounds for inferring facts essential to a recovery. While not required to do so, we nevertheless have read the evidence, and are impressed with its lack of probative force in many respects, particularly with reference to the mental condition of Joseph Peggs during the last two years of his life.

and consequently at the particular time when it is insisted that the improper influence of appellants so controlled him as to make the disposition which was made of his property not his act, but their own. See discussion of undue influence and unsound mind, in the recent case of *Wiley v. Gordon* (1914), 181 Ind. 252, 104 N. E. 501. There is much evidence to the effect that the disposition of his property was made in conformity to his own instructions, and, under the rule stated in the last mentioned case, it is questionable whether under the evidence it would be a proper inference deducible therefrom that he was at that time of undisposing mind.

It is insisted that the court erred in refusing to allow Ruby Myers and John Myers, who were named as parties defendant to testify in the case and in whose favor the court directed a verdict at the close of the evidence, except as to the

15. mental capacity of the decedent. Section 519

Burns 1914, §496 R. S. 1881, provides that all persons, whether parties to or interested in the suit, are competent witnesses in a civil action, but among the many exceptions to this rule is the following, "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate." §521 Burns 1914, §498 R. S. 1881. In construing this section of our statute it has been held that "party" means a party to the issue and not merely a party to the record, and that to be incompetent as a witness, such party must have an interest adverse to the estate. *Spencer v.*

Robbins (1886), 106 Ind. 580, 5 N. E. 726; *Owings v. Jones* (1898), 151 Ind. 30, 51 N. E. 82. There was absolutely no evidence in the case that the witnesses Myers and Myers were necessary parties to the issue or record or that they had any interest in the controversy which was adverse to the estate, and it is only as to such persons that the statute refers, and makes incompetent to testify. As is said in the case of *Michigan Trust Co. v. Probasco, supra*, "Parties to the issue must mean the parties between whom there is a controversy submitted to the court for trial; the parties who are litigating the particular controversy, and against one of whom and in favor of the other, the court will render a judgment or decree. It can not be said that because a person has an interest in the result of the suit he is a party to the issue." So in the case at bar, simply because the witnesses had received \$10 from a distribution of funds during the lifetime of decedent would not under the statute make them incompetent to testify generally, and as there was no evidence of any kind to connect them with the alleged wrongful conversion of any property of Joseph Peggs, they were competent witnesses and their evidence should have been permitted to stand. We are wholly unable to concede from the record that the court's ruling can be explained on the theory that the evidence of these witnesses was merely cumulative. So far as we are able to learn, it related principally to the same issue in the case as that testified to by other witnesses, but under different circumstances, at different times and under different conditions.

As to appellant Craig, whose evidence was restricted to evidence of the mental capacity of Joseph Peggs, it appears that he had been

16. called by the plaintiffs and required to testify generally in the first of the two former suits

referred to in this opinion in which he was a defendant between substantially the same parties who remained in this case at the close of the trial, and where the issues were substantially the same. And in the case at bar, when a witness, under the peculiar circumstances of this case, was permitted to relate the testimony of Wm. A. Peggs, a witness in the second of the former suits, who had since died, it was agreed between the parties that the parties to the suit in which Peggs testified, and the issues therein involved were the same as in the present case, and it is very evident from the entire record that for all intents and purposes the parties were the same and the issues the same as in the case in which witness Craig had also testified. The complaint in that case charged a conspiracy by the same persons charged in this case, and charged that they gained their purpose by unduly influencing Joseph Peggs, and that Joseph Peggs was of unsound mind at the time. The record also shows that interrogatories had been presented to Craig during the pendency of the first suit, and he was required to and did answer them, covering the same issues involved in the present suit, and in both instances when he had been asked to do so, he had given in detail the facts and circumstances as he knew them covering all the charges made against him and the two daughters of Joseph Peggs regarding the disposition of his estate during his lifetime. It also appears that he was called as a witness in the first suit by plaintiff, and was compelled to answer the interrogatories under oath presented by the plaintiff, so that his incompetency to testify as to the same matters in this case must be held to have been waived. §526 Burns 1914, Acts 1883 p. 102; *Norvell v. Cooper* (1910), 155 Mo. App. 445, 134 S. W. 1095; *Imboden v. St. Louis Union Trust Co.* (1905), 111 Mo. App.

220, 86 S. W. 263; *Killian v. Heinzerling* (1906), 114 App. Div. 410, 99 N. Y. Supp. 1036; *Bair v. Frischkorn* (1892), 151 Pa. St. 466, 25 Atl. 123; *Garrett v. Weinberg* (1898), 54 S. C. 127, 137, 138, 31 S. E. 341, 34 S. E. 70; *Young v. Montgomery* (1903), 161 Ind. 68, 67 N. E. 684.

Every party to a suit should be permitted to furnish the jury with all the legitimate proof to sustain his contention which is in his power to produce, so that the jury may, upon all the facts surrounding the controversy, reach as nearly as possible a just verdict. We can not say that if the trial court would have permitted the testimony of the three witnesses named to go to the jury on other issues, save the soundness of mind of Joseph Peggs, to be considered by the jury, the result of the trial would have been the same. It was error for the court to exclude it. Other questions have been argued in the briefs, but since the judgment must be reversed for the reasons given, and as it is not likely that they will occur in another trial, it is unnecessary for us to discuss them.

For the errors indicated the judgment is reversed and the cause remanded for new trial.

NOTE.—Reported in 108 N. E. 395. As to the common-law powers of administrators, see 78 Am. St. 171. As to right of legatee or distributee to sue for assets belonging to decedent's estate, see 4 Ann. Cas. 193; 20 Ann. Cas. 95. As to waiver by a personal representative of incompetency of witness to testify to transaction with decedent see Ann. Cas. 1913 A 682. See, also, under (1) 11 Cyc 255-258; (2) 3 C. J. 474; 11 Cyc 257; (3, 5) 11 Cyc 257; (6) 3 Cyc 327; (7) 3 Cyc 377; (8) 18 Cyc 62; (9) 14 Cyc 146, 153; (10) 18 Cyc 996; (11) 18 Cyc 944; (12) 18 Cyc 1016; (13) 31 Cyc 140; (14) 8 Cyc 685.

COLE MOTOR CAR COMPANY v. LUDORFF.

[No. 8,971. Filed February 17, 1916.]

1. **APPEAL.**—*Questions Presented.*—*Answers to Interrogatories.*—*Scope of Review.*—The court on appeal in reviewing the overruling of a motion for judgment on the jury's answers to interrogatories, can consider only the issues, the general verdict and the answers to the interrogatories. p. 122.
2. **TRIAL.**—*Verdict.*—*Answers to Interrogatories.*—A general verdict finds every material issuable fact in favor of the prevailing party, and all reasonable presumptions will be indulged in its favor as against the jury's answers to interrogatories. p. 123.
3. **TRIAL.**—*Verdict.*—*Answers to Interrogatories.*—Contradictory answers to interrogatories neutralize each other, and where the answers are contradictory, or are not irreconcilable with the general verdict by any evidence admissible under the issues, they will not sustain a motion for judgment thereon notwithstanding the general verdict. p. 123.
4. **APPEAL.**—*Review.*—*Interrogatories to Jury.*—An interrogatory submitted to the jury asking "if plaintiff had looked with reasonable care could she have seen the automobile which struck her while it was traveling a space of more than one square before it struck her," was not objectionable as calling for the ultimate conclusion of the jury as to whether plaintiff under all the facts and circumstances of the case exercised ordinary care for her own safety, though it was perhaps objectionable in that it involved the application of a legal principle to determine whether if plaintiff had "looked with reasonable care," she could have seen the approaching automobile. p. 123.
5. **NEGLIGENCE.**—*Use of Street.*—*Presumptions.*—In the absence of knowledge to the contrary, one lawfully using a public street has the right to presume that others using it in common with him will use ordinary care to avoid injuring him, and that persons driving thereon will do so in conformity to ordinances or laws regulating such use. p. 124.
6. **NEGLIGENCE.**—*Use of Street.*—*Presumptions.*—*Contributory Negligence.*—While the wrongful conduct of one who drives an automobile at an unlawful speed will not excuse a pedestrian upon the street from the exercise of care for his own safety, the absence of knowledge on his part of the unlawful conduct of such driver authorizes a consideration of the presumption of due care and conformity to law in determining whether under the particular circumstances the pedestrian exercised ordinary care for his own safety. p. 124.
7. **NEGLIGENCE.**—*Collision on Street.*—*Verdict.*—*Answers to Interrogatories.*—In an action for injuries to plaintiff who was struck by an automobile while crossing a street, where the issues were

such as to render admissible evidence that would wholly absolve plaintiff from the duty of looking, answers to interrogatories which did not show that she wholly failed to exercise care for her safety were not in conflict with a general verdict for plaintiff, in view of the presumptions plaintiff could indulge, even if they showed that she failed to look in the direction from which the automobile approached. p. 125.

8. *APPEAL.—Review.—Instructions.—Applicability to Evidence.*—In an action for injuries received by plaintiff who was struck by an automobile while crossing a street, where there was evidence that the collision occurred about dusk at a business portion of the city with which plaintiff was not familiar, and where the operation of street cars and traffic made much noise, that the automobile approached without a light and without the sounding of the horn, and that plaintiff was unaware of its approach until the instant it was upon her, etc., an instruction defining ordinary care and stating that the law does not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind that would otherwise be required under circumstances not indicating sudden peril, was applicable to the evidence and was properly given. p. 127.
9. *APPEAL.—Review.—Instructions.*—The objection that an instruction is based upon a statute claimed to be unconstitutional is unavailable where the undisputed evidence shows that the case involved a portion of the statute which is not claimed to be invalid, and the instruction given was applicable to the evidence. pp. 128, 129.
10. *COURTS.—Jurisdiction.—Constitutional Questions.*—The Appellate Court does not have jurisdiction to dispose of a case in which a constitutional question is properly raised and presented. p. 128.
11. *APPEAL.—Presenting Questions for Review.—Constitutional Questions.*—Mere abstract propositions of law and general statements, though made under "Points and Authorities" in appellant's brief, are insufficient to present any question; hence the alleged unconstitutionality of a law was not raised where neither the particular section claimed to be invalid, nor the particular constitutional provision claimed to be violated, is definitely pointed out. p. 128.
12. *APPEAL.—Constitutional Questions.—Determination of Cause on Merits.*—Where the merits of the cause may be passed on without deciding a constitutional question the courts do so. p. 129.
13. *DAMAGES.—Complaint.—Evidence.—Instructions.*—In an action for personal injuries, where the complaint alleged that plaintiff was a housekeeper and did her own sewing before she was injured, and that after receiving the injuries she was unable to perform any labor, was an invalid, and permanently unable to perform any household duties, and the evidence showed that plaintiff was an unmarried woman, an instruction authorizing the jury to consider loss of time as an element of damages was warranted. p. 129.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by Lillie Ludorff against the Cole Motor Car Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

John B. Elam, J. W. Fesler, Harvey J. Elam and Howard S. Young, for appellant.

Eph Inman, Alfred M. Bain, Emmet F. Branch and Urban C. Stover, for appellee.

FELT, P. J.—This is a suit for damages for personal injuries alleged to have been received by appellee on account of one of appellant's employes negligently driving an automobile upon and over appellee on one of the streets of the city of Indianapolis. Issues were formed by a complaint and an answer of general denial. The jury found for appellee and with the general verdict returned answers to interrogatories. From a judgment on the general verdict appellant has appealed and assigned as error the overruling of its motion for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict, and the overruling of its motion for a new trial.

Omitting formal allegations, the gist of the complaint is that appellant employed one McGinnis as a test car driver and, on November 7, 1912, at the junction of Virginia Avenue, Pine and Noble streets in the city of Indianapolis, appellee attempted to walk across to the south side of the avenue and used due care for her own safety while so doing; that said McGinnis negligently drove an automobile at a speed of more than fifteen miles per hour, to wit, twenty miles per hour, without sounding any horn or giving any signal of his approach and negligently and recklessly drove the automobile against

appellee, knocked her down and severely and permanently injured her.

The answers to the interrogatories in substance show that shortly before the accident appellee was standing on the sidewalk, near the curb along Virginia Avenue and about eight feet southeast of the intersection of the south curb on Pine Street; that she started to walk across the avenue in a north-easterly direction and proceeded about sixteen feet when she was struck; that after she started across the street she did not look southeast along the avenue for the approach of vehicles and did not see the automobile that injured her until the instant she was struck; that the automobile that struck appellee came along the avenue a distance of two squares before it struck her; that she was on the sidewalk near the place where she was injured while the automobile was traveling a distance of about two squares along the avenue and if she "had looked with reasonable care" she could not "have seen the automobile which struck her while it was traveling a space of more than one square before it struck her"; that if she had looked and seen the automobile a square before it reached her she could have avoided the accident; that the automobile was about 150 feet from her when she stepped from the sidewalk into the street and there was nothing to prevent her from seeing it; that she was at that time about forty-four years of age, had good eyesight and was familiar with the manner in which the streets of Indianapolis are used by automobiles and other vehicles.

In passing on a motion for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict, we can only con-

1. sider the issues, the general verdict and the answers to the interrogatories. The general

verdict finds every material, issuable fact, in favor of the prevailing party and all reasonable presumptions are in its favor as against the answers of

2. the jury to the interrogatories. Contradictory answers to interrogatories neutralize each other and can not overcome the general verdict. A motion for judgment on the answers to the

interrogatories can only be sustained when 3. the answers are in irreconcilable conflict with the general verdict and can not be reconciled

by any evidence that might have been properly admitted under the issues of the case. *Jeffersonville Mfg. Co. v. Holden* (1913), 180 Ind. 301, 307, 102 N. E. 21; *Cleveland, etc., R. Co. v. Federle* (1912), 50 Ind. App. 147, 152, 98 N. E. 123; *Lutz v. Cleveland, etc., R. Co.* (1915), 59 Ind. App. 16, 108 N. E. 886; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903.

It is contended by appellant that interrogatory No. 10 and the answer thereto must be disregarded because it calls for the ultimate conclusion as to what amounted to due care on the part of

4. appellee. The question and answer are as follows: "If the plaintiff had looked with reasonable care could she have seen the automobile which struck her while it was traveling a space of more than one square before it struck her? A. No." The question is not objectionable on the ground that it calls for the ultimate conclusion of the jury as to whether appellee under all the facts and circumstances of the case exercised ordinary care for her own safety. The question is limited in its scope and seeks to ascertain whether appellee by looking could have seen the automobile which struck her, while it was traveling a square or more. It may be objectionable for another reason not urged by appellant, viz., that it involves the application of

a legal principle to determine whether if appellee had "looked with reasonable care," she could have seen the approaching automobile. *Dodge Mfg. Co. v. Kronewitter* (1914), 57 Ind. App. 190, 199, 104 N. E. 99; *Lagler v. Roch* (1914), 57 Ind. App. 79, 86, 104 N. E. 111; *Tippecanoe Loan, etc., Co. v. Jester* (1913), 180 Ind. 357, 375, 101 N. E. 915, L. R. A. 1915 E 721; *Marietta Glass Mfg. Co. v. Pruitt* (1913), 180 Ind. 434, 437, 102 N. E. 369; *Board, etc. v. Bonebrake* (1896), 146 Ind. 311, 315, 45 N. E. 470; *Wabash R. Co. v. Keister* (1904), 163 Ind. 609, 615, 67 N. E. 521; *Pennsylvania Co. v. Reesor* (1916), 60 Ind. App. 636, 108 N. E. 983. But disregarding this interrogatory and the answer thereto, we can not say as a matter of law that the answers to the interrogatories are in irreconcilable conflict with the general verdict.

In the absence of knowledge to the contrary, one who is lawfully using a public street has the right to presume that others using it in common

5. with him will use ordinary care to avoid injuring him and, in the absence of information or notice to the contrary, may presume that persons driving upon the street will not in so doing violate any ordinance or law but will conform thereto. *Elgin Dairy Co. v. Shepherd* (1915), 183 Ind. 466, 108 N. E. 234; *Rump v. Woods* (1912), 50 Ind. App. 347, 352, 98 N. E. 369; *Louisville, etc., Traction Co. v. Lottich, supra*. The wrongful conduct of one who runs an automobile at an unlaw-

6. ful rate of speed will not excuse a pedestrian upon the street from the exercise of ordinary care for his own safety, but, in the absence of knowledge on his part of such excessive or unlawful speed, the court or jury trying the case may consider the presumption of due care and conformity to the law in determining whether under the circumstances of

any particular case such pedestrian exercised ordinary care for his own safety, or was guilty of negligence which proximately contributed to his injury. *Rump v. Woods, supra; Louisville, etc., Traction Co. v. Lottich, supra; Virgin v. Lake Erie, etc., R. Co. (1913), 55 Ind. App. 216, 224, 101 N. E. 500.*

The interrogatories are in some measure contradictory to each other on the question of appellee's care in attempting to cross the street. They do

not show that she wholly failed to exercise

7. care for her safety. The general verdict

finds that she exercised ordinary care in attempting to cross the street at the time and place and under the conditions shown by the evidence. The answers show that she walked a distance of sixteen feet from the curb before she was struck, and if it be conceded that they also show that she did not look in the direction from which the automobile came while walking that distance and that by looking she could have seen the approaching automobile, they are not then shown to be in irreconcilable conflict with the general verdict. Under the issues evidence was admissible that might wholly absolve her from the duty of looking in that particular direction while walking so short a distance. Likewise had she looked and mistaken the distance or misjudged the speed of the approaching automobile, it would still be a question of fact for the jury to determine from all the facts and circumstances shown by the evidence whether in attempting to cross, and while in the act of crossing, she exercised ordinary care for her own safety. The answers, therefore, in view of the facts shown by them, the facts provable under the issues and the presumptions appellee was permitted to indulge under the particular facts of this case, fall short of showing such antagonism to the general verdict as to overcome it. *Louisville, etc.,*

Traction Co. v. Lottich, supra; Cleveland, etc., R. Co. v. Nichols (1913) 52 Ind. App. 349, 354, 99 N. E. 497; *Lutz v. Cleveland, etc., R. Co., supra*. It follows that the court did not err in overruling appellant's motion for judgment on the answers of the jury to the interrogatories.

Under the motion for a new trial complaint is made of the giving of certain instructions and of the refusal of the trial court to give certain instructions tendered by appellant. Most of the objections urged are answered by the propositions of law already stated in this opinion. This is true of those which deal with the presumptions appellee was permitted to indulge in while attempting to cross the street. The instructions given state the law substantially as recently declared by the Supreme Court in *Elgin Dairy Co. v. Shepherd, supra*, and as announced in other decisions cited in this opinion. Complaint is made of instructions Nos. 4 and 12 given by the court of its own motion, which are as follows: "4. Ordinary care is such care as a person of ordinary prudence would usually exercise under like circumstances, and the law does not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind as would otherwise be required of him under circumstances not indicating sudden peril. * * *

12. The statute in force at the time of the accident complained of provides that any person or persons operating a motor vehicle on any public highway or in any public place shall not operate the same at any rate of speed greater than is reasonable and proper, having regard to the use in common of such highway or place, or so as not to endanger the life or limbs of any person, and in no event shall such motor vehicle be operated at a greater rate of speed than eight miles per hour in the business and closely

built-up portions of any municipality of this state, not more than fifteen miles per hour in any other portions of such municipality, and upon approaching a crossing of intersecting highways or traversing a curve a person operating a motor vehicle shall have it under control and operate it at a speed not greater than is reasonable and proper, having regard to the safety and traffic then on such highway and of the public, and that after dark all automobiles shall carry lighted lamps, and said statute provides a penalty for its violation. I instruct you, if you find from a preponderance of the evidence, that the plaintiff was injured as alleged in her complaint by being run over by an automobile of defendant being operated and run by defendant's employe acting within the scope of his employment, and that on the occasion complained of said automobile was being operated by such employe at a higher rate of speed than that authorized by this statute, then you will be authorized to find that said machine was being operated at a negligent rate of speed and that such negligence is attributable to defendant herein."

It is contended by appellant that there is no evidence which warranted the trial court in giving instruction No. 4. The evidence tends to

8. show that appellee was injured by being struck by a test car of appellant driven by one McGinnis; that the injury occurred at the junction of Pine and Noble streets and Virginia Avenue in a business portion of the city of Indianapolis, at about five o'clock in the evening when it was "getting dusk"; that street cars are operated over the streets and there is much traffic and noise in that vicinity; that appellee lived in north Indianapolis and was just before her injury looking for a dress-maker's shop; that she looked both ways before she stepped from the sidewalk into the street; that she

was about eight feet from the sidewalk when the automobile came suddenly from Virginia Avenue headed for Noble Street; that no horn was sounded and no lights were on the car; that she saw the car the instant it was upon her and became somewhat bewildered, and crouched, or hesitated, or stepped back and for the instant seemed uncertain what to do and was struck, knocked down and run over by the test car driven at a speed variously estimated at from twelve to twenty-five miles per hour. If one acts naturally in a case of sudden and instant peril put upon him by another and is injured, he may not be guilty of negligence contributing thereto, although afterwards, out of the presence of danger, with time to reflect, and consider all the facts, it may appear that another course of conduct might have avoided the injury. *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 65, 98 N. E. 654, 100 N. E. 313, and cases cited. The court therefore in view of the evidence, did not err in giving instruction No. 4.

It is claimed by appellant that instruction No. 12 is erroneous because it is based on the act of 1907 (Acts 1907 p. 558, §10465 Burns 1908) which it claims is so indefinite as to be invalid and

9. authorizes the taking of property without due process of law in violation of the Constitution of the United States. If a constitutional question is raised and duly presented this court does not have jurisdiction to dispose of the case. §1391

10. Burns 1914, Acts 1901 p. 565. Appellant does not point out definitely the section of the Indiana law it claims is indefinite and uncertain nor does it definitely point out the portion of the Federal Constitution it claims is violated. Mere abstract

11. propositions of law and general statements though made under points and authorities are

insufficient to present any question. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652. Where the merits of the cause may be passed on without deciding a constitutional

12. question the courts do so. *In re Mertes' Estate* (1914), 181 Ind. 478, 480, 104 N. E.

753. Furthermore the undisputed evidence in this case shows a violation of that part of the statute which it is not claimed is indefinite and uncer-

9. tain. The driver of the automobile admitted that he was driving at a rate of speed of from twelve to fifteen miles per hour and other witnesses testified to a much higher rate of speed. The act provides that: "In no event shall such motor vehicle be operated at a greater rate of speed than eight miles an hour in the business and closely built-up portions of any municipality of this state, nor more than fifteen miles an hour in any other portions of such municipality." Therefore, under the facts of this case, in any view that may be taken, appellant was not harmed by the giving of instruction No. 12. But, see, also *State v. Louisville, etc., R. Co.* (1912), 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914 D 1284; *Shea v. City of Muncie* (1897), 148 Ind. 14, 34, 46 N. E. 138; *People v. Dow* (1908), 155 Mich. 115, 118, 118 N. W. 745; *Strickland v. Whatley* (1914), 142 Ga. 802, 83 S. E. 856. Objection is urged to instruction No. 16, on the ground that it erroneously permitted the jury to include in its award of damages something for loss of

13. "time when there was no demand in the complaint for this item of special damages and no evidence any time of any value lost." The averments show that appellee was a housekeeper and did her own sewing before she was injured; that since she received her injuries she has been unable to perform any labor and was thereby made an invalid

and rendered permanently unable to perform any household duties. The pleading is sufficient to satisfy the rule which requires loss of time or diminished earning capacity or loss of business to be specially pleaded and proven to warrant a recovery therefor. The evidence tends to sustain the averments and shows that appellee was an unmarried woman. The instruction containing the phrase "loss of time and any reduction in her ability to earn money" is not objectionable on the ground urged against it and considering the facts of the case alleged and proven we can not say that appellant was harmed by the giving of the instruction. *Lake Erie, etc., R. Co. v. Chriss* (1914), 57 Ind. App. 145, 147, 105 N. E. 62; *Louisville, etc., Traction Co. v. Lotitch, supra*; *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 683, 103 N. E. 738.

We find no reversible error in the giving of instructions to the jury. Those tendered by appellant and refused by the court were in substance covered by those given. The instructions as a whole fully and fairly state the law applicable to the case under the issues and evidence shown by the record. We have examined the questions relating to admission of evidence and find no ruling which deprived appellant of any substantial right. The evidence tends to support the verdict. On the whole the case seems to have been fairly tried and a correct result reached. No intervening error harmful to appellant is presented, which would warrant a reversal of the judgment. Judgment affirmed.

NOTE.—Reported in 111 N. E. 447. As to presumption by pedestrian of exercise of due care by driver, see 19 L. R. A. (N. S.) 166; 39 L. R. A. (N. S.) 486. As to care required by one in sudden emergency, see 37 L. R. A. (N. S.) 43. As to duty of pedestrian injured by automobile in case of emergency, see 38 L. R. A. (N. S.) 494; 51 L. R. A. (N. S.) 1005. As to rights and duties of pedestrians and vehicles in highways, see 4 Ann. Cas. 398; Ann. Cas. 1914 A 249. See,

also, under (1) 38 Cyc 1930; (2) 38 Cyc 1869, 1901; (3) 38 Cyc 1926; (4) 38 Cyc 1916; (5) 29 Cyc 516; (6) 29 Cyc 596; (7) 29 Cyc 658; (8) 29 Cyc 647; (11) 3 C. J. 1428; 2 Cyc 1016; (12) 3 Cyc 223; 8 Cyc 798; (13) 13 Cyc 238.

KUHN ET AL. v. POWELL.

[No. 8,902. Filed February 23, 1916.]

1. **NEW TRIAL.**—*Motion.*—*Joint Specification of Error.*—*Effect.*—An assignment in a motion for new trial that “the court erred in giving instructions numbered one, two, three, four, five and six on its own motion”, is joint as to the instructions named, and all the instructions must be bad in order that it may be available on appeal. p. 133.
2. **APPEAL.**—*Questions Presented.*—*Motion for New Trial.*—*Joint Specification.*—Where the specification in the motion for a new trial of error in the giving of instructions was joint, and unavailable because some of the instructions were conceded to be good, an assignment that the verdict is contrary to law predicated on the giving of alleged erroneous instructions, also presents no question. p. 133.
3. **SALES.**—*Action for Price.*—*Recovery of Interest.*—*Demand.*—*Evidence.*—In an action for the purchase price of corn sold and delivered, evidence showing that following delivery plaintiff called on defendant’s manager for settlement of the account, and that plaintiff on being at variance with the amount conceded by such agent to be due, insisted that payment be made according to her own figures, constituted sufficient proof of demand to entitle her to recovery of interest on the amount due. p. 133.
4. **INTEREST.**—*Recovery.*—*Unliquidated Claim.*—Interest may be recovered on an unliquidated claim under some circumstances. p. 134.
5. **SALES.**—*Action for Price.*—*Recovery of Interest.*—A verdict for the selling price of corn plus interest was not subject to the objection that the amount of recovery was too large, on the theory that interest may not be collected on an unliquidated claim, where the amount of the claim rested in mere computation; since under such circumstances the claim was not unliquidated. p. 134.
6. **SALES.**—*Action for Price.*—*Recovery of Interest.*—*Pleading.*—*Failure to Demand Interest.*—In an action for the price of corn sold and delivered, a verdict for plaintiff including an award of interest will not be disturbed on appeal on the ground that interest was not demanded in the complaint, since the court will deem the complaint to have been amended to conform to the proof under the provisions of §700 Burns 1914, §658 R. S. 1881. p. 134.

From Knox Circuit Court; *Benjamin M. Willoughby*, Judge.

Action by Anna Powell against Paul Kuhn and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

S. M. Emison, for appellants.

C. B. Kessinger, for appellee.

CALDWELL, J.—Appellee alleges in her complaint that appellants are indebted to her in the sum of \$2,217.60, for 4,928 bushels of corn sold and delivered to them in the fall of 1912, at 45 cents per bushel. Prayer for judgment for \$3,000 and general relief. Appellants answered, admitting the purchase and delivery of the corn, but alleging that the contract price was 40 cents per bushel, rather than 45 cents. By their answer they also admit that they are indebted to appellee in the sum of \$1,971.20, for which amount they offer to confess judgment with costs added to the filing of the answer. A trial by jury resulted in a verdict and judgment in favor of appellee for \$2,306.30.

The questions urged on this appeal arise under the motion for a new trial, and are in effect that the recovery is too large; insufficiency of the evidence; that the verdict is contrary to law, and alleged error in giving instructions. The parties apparently agree that the items entering into the verdict are the amount due on the corn at 45 cents per bushel, and interest on such amount in the sum of \$88.70. The general verdict includes a finding by the jury that the contract price for the corn was 45 cents rather than 40 cents per bushel. There is evidence to sustain the verdict in this respect. We understand, however, from the briefs that all the questions urged upon our attention, including the insufficiency of the evidence, are directed to the sole query

of whether interest was properly allowed on the unpaid selling price of the corn. The assign-

1. ment in the motion for a new trial, relating to the giving of instructions is in the following language: "The court erred in giving instructions numbered one, two, three, four, five and six on its own motion." Such assignment is joint as to the instructions named. It follows that all included in the assignment must be incorrect in order that the assignment may be available. Appellants in their brief attack only the fourth of those named, and thereby concede that the others are correct. The assignment therefore must fail. *Young v. Montgomery* (1903), 161 Ind. 68, 67 N. E. 684; *Chicago Furn. Co. v. Cronk* (1905), 35 Ind. App. 591, 74 N. E. 627. The assignment that the verdict

2. is contrary to law is predicated by appellants on the giving of alleged erroneous instructions. It follows that this assignment also presents no question.

There remain for our consideration the question of whether the amount of the recovery is too large, which question is directed to the item of

3. interest, conceded to be included in the verdict and the subsidiary question of whether the evidence is sufficient to sustain that element of the verdict. There was no express contract for the payment of interest. There is a statutory provision that "on * * * an account closed on the day an itemized bill shall have been rendered and payment demanded, * * * interest shall be allowed at the rate of six dollars a year on one hundred dollars." §7952 Burns 1914, §5200 R. S. 1881. It is argued that the evidence fails to show a demand of payment, and that as a consequence interest was not allowable. There was evidence that in the early fall of 1912, appellee contracted with

appellants through the manager of their elevator for the sale of her corn. Delivery pursuant to the sale was completed by December 1. About February 1, 1913, appellee called on appellants' manager for payment of the account. The parties agreed that the amount of corn sold and delivered was 4,928 bushels. The manager proceeded to figure the bill at 40 cents per bushel, amounting to \$1,971.20, and signified his readiness to settle on that basis. Appellee figured it at 45 cents per bushel, amounting to \$2,217.60, and insisted that payment be made accordingly. The effect of this evidence is that appellee presented her claim to appellants with a request that it be paid, and it is therefore sufficient as proof of a demand. 13 Cyc 777; *Brackenridge v.*

State (1889), 27 Tex. App. 513, 11 S. W. 630,

4. 4 L. R. A. 360; *Penn Mut. Life Ins. Co. v.*

Maner (1908), 101 Tex. 553, 109 S. W. 1084.

It is urged also that the claim here was unliquidated, and that interest may not be charged or collected on an unliquidated account. That

5. interest may be recovered on an unliquidated claim under some circumstances, see

Independent, etc., Stores v. Earles (1914), 57 Ind.

App. 241, 106 N. E. 730, and cases cited. More-

over, the claim here was not unliquidated. The

jury having ascertained the terms of the contract,

the amount of the claim rested in mere computation.

39 Cyc 836 and cases.

It is argued also that as appellee by her complaint did not demand interest as a part of the relief sought, and as it contains no specific allegation

6. tion on that subject, appellee was not entitled to an allowance of interest on the amount of

the claim found to be due and unpaid. In *Ross v.*

Smith (1888), 113 Ind. 242, 15 N. E. 268, under

facts practically identical with those presented here

in so far as concerns the matter now under discussion, an allowance of interest was approved. See, also, *Marsteller v. Crapp* (1878), 62 Ind. 359, 361. It would seem, however, that where interest is claimed by virtue of some statutory provision, or by reason of unreasonable delay in payment after the duty to pay arises, sound practice would require that facts be averred in the one case sufficient to bring the situation within the statute, and in the other facts showing the delay. Under such a rule, however, in the situation presented here, the complaint should be deemed to be amended to conform to the proof. §700 Burns 1914, §658 R. S. 1881; *Carpenter v. Sheldon* (1864), 22 Ind. 259. It is conceded here that the jury allowed interest from the time of the demand to the date of the verdict. Estimating the corn at 45 cents per bushel, and adding such interest, the amount thus arrived at is the same as the verdict. Appellee's claim was due at the time of the demand, and should then have been paid. Not only is she entitled to such interest under the statute, but it is equitable and just that she recover it. It follows that no error is presented. The judgment is affirmed.

NOTE.—Reported in 111 N. E. 639. As to power of court to amend verdict by adding interest, see 25 L. R. A. (N. S.) 311. As to right to interest on unliquidated damages, see 28 L. R. A. (N. S.) 1. See, also, under (1) 4 C. J. 981; 29 Cyc 949, 950; (2) 29 Cyc 951; (3) 22 Cyc 1550; (4) 22 Cyc 1513, 1514; (5) 22 Cyc 1513.

BUMP ET AL. v. MCGRANNAHAN.

[No. 8,972. Filed February 23, 1916.]

1. PLEADING. — *Complaint. — Counterclaim. — Sufficiency. — Action Commenced Before Justice of the Peace.*—In an action commenced before a justice of the peace, a complaint setting forth that plaintiffs were architects who had rendered services for defendant at his special instance and request in supervising the construction of a building, which were of a specified value, and that the amount claimed was due and unpaid, and a paragraph of counterclaim by defendant alleging that the services were pursuant to an oral contract by which plaintiffs were to compel the contractors to construct the building according to plans and specifications, that defendant was at all times ready to perform, but plaintiffs failed to turn the building over to defendant fully completed and at the price stated in the specifications and caused contractors to be paid in full, all in violation of their agreement, that it would require the expenditure of \$400 to complete the building according to plans and specifications, and that the contractors were paid by defendant at the direction of plaintiffs without knowledge on his part that the building had not been completed, whereby defendant was damaged in the sum of \$300, were each sufficient to withstand a demurrer for want of facts. pp. 138, 140.
2. PLEADING. — *Complaint. — Counterclaim. — Sufficiency. — Action Commenced Before Justice of the Peace.*—In an action originating before a justice of the peace a complaint, or counterclaim, will be sufficient if it informs the adverse party of the nature of the cause of action he is called upon to meet and is sufficiently explicit to bar another action for the same cause if judgment is rendered thereon. p. 140.
3. CONTRACTS.—*Oral Contracts.—Construction.—Province of Court and Jury.—Instructions.*—It is the duty of the court to construe and state the legal effect of an oral contract, the same as in the case of written contracts; but where the terms of an oral contract are in dispute and its meaning doubtful, the court should submit the questions of fact to the jury to be determined from the evidence and state the law applicable thereto in hypothetical instructions; hence an instruction advising the jury that it was for the jury to construe the oral contract sued on was erroneous. p. 140.
4. APPEAL.—*Review.—Issues.—Instructions.*—In an action on an oral contract, where defendant filed a counterclaim for damages, an instruction that in case the jury found anything due on the counterclaim "it must be deducted from the \$106 which is due the plaintiffs", aside from the fact that it was more or less vague and indefinite, was erroneous for the reason that under the issues the jury could find for plaintiffs on the complaint, and on the

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counterclaim for defendant in an amount greater than the plaintiff's claim, in which event the latter amount should have been deducted from the amount found due on the counterclaim. p. 142.

5. **APPEAL.**—*Review.*—*Refusal to Direct Verdict.*—In an action on an oral contract, in which defendant filed a counterclaim for damages, where the evidence, though not clear or satisfactory, was such that the court could not say as a matter of law that there was no evidence from which an inference of liability on the counterclaim could have been reasonably drawn by the jury, there was no error in refusing an instruction to return a verdict for plaintiffs. p. 143.
6. **CONTRACTS.**—*Action.*—*Issues.*—*Liability.*—In an action by architects to recover for services rendered, where defendant filed a counterclaim alleging that the services were pursuant to an oral contract to superintend the construction of a building, and averring a breach thereof in that plaintiffs did not cause the building to be fully completed and that they had caused defendant to pay the contractors in full, all to his damage in a certain sum, the failure to complete the building was only involved to the extent that such fact showed or tended to show that defendant was damaged by plaintiffs' alleged violation of their contract, and the measure of plaintiffs' liability was the amount of money which they wrongfully caused defendant to pay in ignorance of the fact that it was not due, not exceeding in any event the amount required to complete the building at the contract price. p. 144.
7. **TRIAL.**—*Evidence.*—*Witnesses.*—*Failure to Produce.*—*Presumptions.*—*Instructions.*—Where a party has the power and opportunity of producing evidence or a witness, presumably friendly to him, whose testimony would or could explain a transaction or further enlighten the court or jury, failure to produce such evidence or witness gives rise to the presumption, though rebuttable, that such evidence or the testimony of such witness would be unfavorable to the party or his contention; and, while it is proper to instruct the jury to such effect, such instructions should be carefully worded to guard the interests of the party and should only be given when it reasonably appears that he has it within his power to produce the witness or evidence and fails to do so or to make reasonable effort to that end. p. 145.

From Porter Superior Court; *Harry B. Tuthill*, Judge.

Action by Edwin Bump and others against Jonas A. McGrannahan. From a judgment for defendant, the plaintiffs appeal. *Reversed.*

Wm. J. Whinery, for appellants.

James W. Brissey, for appellee.

FELT, P. J.—On January 4, 1911, appellants filed their complaint in a justice of the peace court of Lake County to recover for services rendered appellee at his special instance and request in the construction of a certain building which work and labor is alleged to be reasonably worth \$106. To this complaint appellee filed an answer in general denial and a plea of payment. He also filed a paragraph of counterclaim in which he alleged a breach of contract on the part of appellants and asked damages therefor. The case was tried by a jury and a verdict rendered in the justice's court for appellants for \$102.55. From this judgment appellee appealed to the Lake Superior Court, where by permission of the court appellee filed an amended counterclaim. A trial by jury resulted in a verdict and judgment that appellants take nothing by their complaint and that appellee recover on his counterclaim against appellants' damages in the sum of \$150. Appellants' motions for a new trial and in arrest of judgment, respectively, were overruled. The errors assigned and relied on for reversal are: (1) The overruling of appellants' demurrer to appellee's amended paragraph of counterclaim; (2) the overruling of appellants' motion for a new trial; (3) the overruling of appellants' motion in arrest of judgment.

The gist of the complaint is that appellants are architects and rendered services for appellee

1. at his special instance and request in supervising the construction of a building on Fur Street in Indiana Harbor, Lake County, Indiana; that the services were of the value of \$106 which amount is due and unpaid. The counterclaim in substance avers that appellants rendered services for appellee which were of some value; that the services were rendered in pursuance of the terms of an oral con-

tract between the parties by the terms of which appellants "agreed to compel certain contractors" to construct a building for appellee in accordance with certain plans and specifications adopted therefor; that appellee at all times was ready to perform his part of the verbal contract but appellants failed and refused to comply with the conditions thereof and failed and refused to compel the contractors to complete the house according to the specifications and to turn the same over to appellee fully completed at the price stated in the plans and specifications; that appellants accepted the house from the contractors as finished before it was completed according to the plans and specifications, in violation of their contract with appellee, and caused the contractors to be paid in full therefor before the house was completed; that the house has not been completed and it will require the expenditure of \$400 to complete the same according to the plans and specifications agreed to by the contractors; that appellants agreed to ascertain the amount of work completed by the contractor or subcontractors and to order payment of not to exceed seventy-five per cent of the contract price of the work actually completed and to notify appellee when any such payment was to be made; that appellants violated their agreement by ordering and directing appellee to pay the full contract price for certain work before the same had been done, which payments were accordingly made by appellee without knowing that the house had not been completed, whereby appellee was damaged in the sum of \$300. Appellants contend that the counterclaim is insufficient to state a cause of action against them because it does not show a breach of the alleged contract nor aver that appellee performed all the conditions of the agreement to be performed by him, and fails

to allege facts which afford any measure of damages. Appellee insists that the counterclaim is sufficient and that the demurrer should be carried back to appellants' complaint and be sustained on the theory that it does not state a cause of action against him.

This suit originated before a justice of the peace and the complaint, or counterclaim, will be sufficient if it informs the adverse party of the

2. nature of the cause of action he is called upon to meet, and is sufficiently explicit to bar another action for the same cause, if judgment is rendered thereon. §§1750, 1751, 1752 Burns 1914, §§1461, 1462, 1463 R. S. 1881; *Cleveland, etc., R. Co. v. Baker* (1900), 24 Ind. App. 152, 154, 54 N. E. 814; *Anderson v. Lipe* (1888), 114 Ind. 464, 466, 16 N. E. 833; *Mitten v. Caswell-Runyan Co.* (1913), 52 Ind. App. 521, 527, 99 N. E. 47. Measured by

the foregoing standard we hold the counter-
1. claim sufficient to withstand the demurrer for insufficient facts, and by the same rule we hold the complaint sufficient to state a cause of action.

Under the motion for a new trial appellants complain of the refusal of the court to give certain instructions tendered by them and of the

3. giving of instructions Nos. 1 to 8 inclusive on the court's own motion. By instruction No. 2 the jury was informed that it is the duty of the court to construe a written contract, but that it was the duty of the jury to determine what the oral contract, if any, was, and to construe it, and it also stated: "That is the distinction between written and oral contracts. A written contract is construed by the court and the jury follows the instructions of the court; the oral contract is for the jury to construe and the court has absolutely no right to

give his opinion regarding what the contract entered into between two parties orally was." In this case both parties to the transaction agree that the contract or arrangement between them rested in parol. By this instruction the jurors were told that it was their right and duty, not only to determine the existence or nonexistence of the contract and to ascertain its terms, if there was an oral agreement, but they were also informed that, after ascertaining its terms, they should construe it, or in other words determine its legal effect. When there is a dispute as to the provisions of an oral contract or there is doubt as to the meaning of such parol agreement, if the case is tried before a jury it is for the jury, under proper instructions, to ascertain from the evidence the intention of the parties in making such parol agreement and to determine as questions of fact the terms and provisions thereof. If there is no dispute as to the terms of such oral contract, the duty of the court in construing it and stating its legal effect is identical with such duty in construing written contracts and informing the jury as to their legal effect. If the contract is in parol and the terms are in dispute or the meaning doubtful, the same duty still rests upon the court, but the manner of performing it is necessarily changed and in such cases the court should submit the questions of fact to the jury to be determined from the evidence and state the law applicable thereto in hypothetical instructions. The court must determine the legal effect of the contract and in such instances the instructions must necessarily be based upon assumed facts, the existence or nonexistence of which the jury is to determine from the evidence. *Annadall v. Union Cement, etc., Co.* (1905), 165 Ind. 110, 111, 74 N. E. 893; *Barton v. Gray* (1885), 57 Mich. 622, 633, 24 N. W. 638; *Beebe v. Koshnic* (1885),

55 Mich. 604, 606, 22 N. W. 59; *Elliott v. Wanamaker* (1867), 55 Pa. St. 67, 73, 25 Atl. 826; *Gassett v. Glazier* (1896), 165 Mass. 473, 480, 43 N. E. 193; *Davies v. Baldwin* (1896), 66 Mo. App. 577, 580; *Muckle v. Moore* (1890), 134 Pa. St. 608, 19 Atl. 801; 9 Cyc 786 (b); 1 Beach, Contracts §745; 2 Elliott, Contracts §1566. The rule is aptly stated by the supreme court of Michigan in *Barton v. Gray, supra*, as follows: "It is the province of the court to construe, interpret and determine the legal effect of all contracts. When the contract is in writing and its execution duly proved, the court must determine the legal effect of the language used. When it is verbal, the question of what the terms of the contract are, as established by the evidence, is for the jury. In the latter case the court must still determine the legal effect, and his instructions to the jury must be necessarily based upon facts assumed, and upon the existence of which the jury are to find from the evidence."

Complaint is also made of the giving of instruction No. 8 on the measure of damages, in the event of a recovery on the counterclaim. There

4. are several suggestions in the instruction that were more or less vague and indefinite and which left the jury free to enter the field of speculation in assessing the damages, and it also told the jury that in case it found anything due on the counterclaim "it must be deducted from the \$106 which is due the plaintiffs," whereas under the issues the jury could find for the plaintiffs upon the complaint and upon the counterclaim for the defendant in an amount greater than the plaintiffs' claim in which event the latter amount should have been deducted from the amount found due on the counterclaim. The forms of verdict submitted also erroneously indicate that the jury was required to find

against the defendant on his counterclaim in case it found for the plaintiffs on their complaint, and *vice versa*, in case it found for the defendant on his counterclaim. The other objections to the instructions given need not be considered in detail since the judgment must be reversed for the errors pointed out and the errors, if any, in such other instructions, will be apparent from the law as stated in this opinion.

The appellants requested the court to peremptorily instruct the jury that there was no evidence to sustain the counterclaim and to return a

5. verdict in their favor. There seems to be no dispute as to the amount due appellants for their services. It is not disputed that the contractor failed to fully complete the building according to the plans and specifications, and there is no dispute that appellee knew the building was not completed, but there is a controversy as to who was in fault in paying certain amounts to subcontractors, which appellee claims they were not entitled to receive, and which payments he claims appellants authorized in violation of their contract with him. It is not disputed that appellants required a bond of the general contractor and that appellee himself waived the giving of such bond. It also appears without contradiction that the general contractor paid \$1,000 to subcontractors without any authority so to do from appellants. The evidence is not clear or satisfactory, but we have concluded that we can not say as a matter of law that there is no evidence from which the inference of liability reasonably could have been drawn by the jury.

To sustain the counterclaim there must be evidence to show that appellants agreed and undertook to supervise the construction of appellee's building and determine for him when any payments

were due the contractor or subcontractors according to the plans, specifications and contracts previously entered into with such parties and to see that the work was done in accordance therewith; that appellee kept and performed his part of the contract with appellants and that they violated their contract with him by wrongfully, and without his knowledge, authorizing payments to be made to the contractor or subcontractors that were not due them under their contracts, whereby appellee in reliance upon such authorization and in ignorance of the fact that the money so paid was not then due, paid out money he should have retained, by reason of which the building was not completed and appellee was damaged to the extent of the money so paid out by him.

It is not claimed, and there is no evidence tending to show, that appellants undertook to construct, or to guarantee the completion of the build-

6. ing at the contract price, and their liability would not, therefore, arise by reason of the failure of the contractor to complete the building according to the contract, nor at all if the building had been fully completed according to contract for the agreed price, even though payments not due had been authorized by appellants, for in such event appellee would not have been harmed. The failure to complete the building is only involved in this suit to the extent that such fact shows, or may tend to show, that appellee was damaged by appellants' alleged violation of their contract. The measure of their liability would be the amount of money which they so wrongfully authorized paid, and which was actually paid by appellee in ignorance of the fact that the money was not due, not exceeding however, in any event, the amount required to complete the building, at the contract price, in accord-

ance with the contract, plans and specifications under which it was to be constructed. The liability for failure to complete the building would be against the one who had contracted so to do, and appellants' liability, if any, would arise as above indicated. *Indiana, etc., R. Co. v. Adamson* (1888), 114 Ind. 282, 286, 15 N. E. 5; *Montgomery County, etc., Soc. v. Harwood* (1891), 126 Ind. 440, 444, 26 N. E. 182; *Hamilton v. Feary* (1894), 8 Ind. App. 615, 620, 35 N. E. 48, 52 Am. St. 485; 8 Am. and Eng. Ency. Law (2d ed.) 632; 13 Cyc 155 (D).

Appellants tendered two instructions which in substance state that where a party to a suit has material evidence within his power and fails to pro-

7. duce it, the presumption arises that such evidence, if produced, would have been unfavorable to him. Where a party has the power and opportunity of producing evidence or a witness or witnesses, presumably friendly to him, whose testimony would, or could, explain a transaction or further enlighten the court or jury, failure to produce such evidence or witnesses, or to make an effort so to do, raises the presumption, that the evidence or testimony, if produced, would be unfavorable to him or his contention. Such contention may be explained or rebutted by other evidence. *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 32, 103 N. E. 869; *Judy v. Jester* (1913), 53 Ind. App. 74, 89, 100 N. E. 15; *Indiana Union Traction Co. v. Scribner* (1911), 47 Ind. App. 621, 637, 93 N. E. 1014; *Lee v. State* (1901), 156 Ind. 541, 548, 60 N. E. 299; *Hinshaw v. State* (1897), 147 Ind. 334, 366, 47 N. E. 157. The instructions tendered invoke a correct principle of law applicable to cases where the party is so situated as to have it in his power to produce witnesses to explain a situation or prove or disprove some material fact affecting his interests or

relations involved in the controversy. The instructions tendered do not make it clear that appellee was present at the trial or that the circumstances were such as to justify the court in giving them, though it is perhaps reasonable to infer that such was the case. When such instructions are given they should be carefully worded to guard the interests of the party and should only be invoked when it reasonably appears that he has it within his power to produce the witness or evidence, which presumably would not be intentionally unfriendly to him, and he fails to do so, or to make any reasonable effort so to do.

For the errors already pointed out the judgment is reversed, with instructions to sustain appellants' motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 111 N. E. 640. As to rights of parties on breach of contracts, see 33 Am. St. 791. As to intention of parties to a contract not reduced to writing as question for jury, see Ann. Cas. 1913 C 1310. As to province of court or jury to determine whether contract is contrary to public policy, see 11 Ann. Cas. 124. See, also, under (1) 24 Cyc 557, 558, 562; (2) 24 Cyc 558; (3) 9 Cyc 591; 38 Cyc 1525; (4) 34 Cyc 761; (5) 38 Cyc 1539, 1567; (6) 5 C. J. 278; 6 Cyc 51; (7) 16 Cyc 1059, 1062; 38 Cyc 1743.

VANDALIA RAILROAD COMPANY v. PARKER.

[No. 8,947. Filed February 23, 1916.]

1. MASTER AND SERVANT.—*Injuries to Servant.*—*Defective Handcar.*—*Assumption of Risk.*—*Knowledge of Defects.*—*Complaint.*—In an action for injuries to a railroad section hand caused by defective condition of a handcar provided by the company for the transportation of its employees, the mere showing in the complaint that plaintiff had ridden upon the car some distance immediately preceding the accident, did not render the pleading objectionable, since in view of the fact that plaintiff had the right to rely on the presumption that defendant had performed its duty to furnish a safe car for his transportation and that he was not required to make an inspection of the car before using it, the court could not

say as a matter of law that he assumed the risk, in the absence of averments showing that the defects were open and obvious, and that plaintiff had actual knowledge of the defect complained of. p. 150.

2. **MASTER AND SERVANT.—Injuries to Servant.—Defective Handcar.—Verdict.—Evidence.**—In a railroad section hand's action for injuries from the defective condition of a handcar furnished for the transportation of employees, whereby he was thrown to the ground on the sudden stopping of the car, a verdict for plaintiff was supported by evidence showing that the defect was such as to cause the car to lurch forward only when the car was brought to a sudden stop, that the occasion of the accident was the first time during the plaintiff's employment that the car was brought to a sudden stop, that the defect was not open and obvious and had not been noticed by him before, and that the defect had been brought to the notice of the foreman by other employees who had noticed it a few days before the accident. p. 151.
3. **TRIAL.—Instructions.—Directing Verdict.**—The trial court should not give a peremptory instruction for defendant unless the evidence favorable to the plaintiff, and the reasonable inferences which the jury is permitted to draw therefrom, fail to support one or more of the essential averments of the complaint. p. 151.
4. **APPEAL.—Review.—Refusal of Instructions.**—There was no error in the refusal of instructions in the absence of evidence in the record to justify giving them, nor in the refusal of an instruction which, in so far as it was applicable, was fully covered by instructions given. p. 151.

From Owen Circuit Court; *James B. Wilson*, Judge.

Action by James Parker against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Samuel O. Pickens and *Owen Pickens*, for appellant.

John E. Sedwick, *Will H. Pigg* and *Hickman & Hickman*, for appellee.

IBACH, C. J.—This action was commenced by appellee against appellant to recover damages for personal injuries. Appellant has appealed from a judgment in appellee's favor, and assigns as errors for reversal the overruling of its demurrer to the

second amended complaint, and the overruling of its motion for a new trial.

The material averments of the amended complaint on the question of negligence are that sometime before the date on which the accident occurred, appellee was a servant in the employ of appellant as a section hand, engaged with a number of other section men in maintaining the roadbed and tracks of appellant. They were employed by and were subject to the orders of another employe, known as the section foreman. Many of the section men lived at Mooresville, Indiana, and for the purpose of transporting the laborers to and from their place of work appellant furnished said section men with a handcar, and "about twelve men so employed were compelled to ride to and from their work on one handcar furnished as aforesaid and the car was overcrowded with men and not sufficient room for all of said employes to safely ride, all of which the defendant knew and which plaintiff did not know, and that said handcar so furnished by the defendant for the use of said employes on the day of the hereinafter alleged injury was old, worn and defective and unsafe in this, to wit, the axles were badly worn and the boxing surrounding said axles of said car and all the parts of said handcar were worn loose and defective, so that when said car was being driven and brought to a sudden halt, the boxing would drop down and forward and throw the bed of the car on which the men rode forward with a lurch, all of which the defendant well knew or by the exercise of reasonable diligence and inspection might have known, and the plaintiff did not know of said defective condition of said handcar at said time or prior thereto. On the — day of September, 1908, while he was in the employ of the defendant as aforesaid, and was being transported from the

place of his said labors on said track * * * and while he, together with about twelve other men, employes of defendant were returning home from their work * * * they were running said hand-car five or six miles an hour, when they saw a locomotive and train approaching upon said track meeting them and they were required to bring said hand-car to a stop to take it clear of said track to avoid collision with said locomotive and that as said car was brought to a stop, that by reason of the defective condition of said worn axles and boxings and other defects on said car as aforesaid, the truck and by reason thereof the employes riding thereon were thrown forward with said lurch, and said car being so badly crowded, men riding thereupon said car were thrown against this plaintiff who was riding on the front end of said car and pumping said car, and he was by reason of such lurch of said car and said men and himself produced as aforesaid thrown forward in front of said car and off said car, said plaintiff falling in front of said car and striking the track bed with great force and violence and said car ran upon his body on said track, crushing and maiming him," etc. There is also the averment that his injuries were caused "wholly by the negligence of the defendant in failing to furnish a safe and good hand-car and failing to inspect and keep said handcar so furnished said employes for transportation as aforesaid in a good and safe condition and furnishing said employes, including this plaintiff, a hand-car for use on said day for their transportation which was defective with badly worn axles and boxings, as afore described."

While this pleading in many respects falls short of being a model, we are satisfied that the averments are sufficient to show the existence of the relation of master and servant, a duty to furnish

plaintiff with a handcar reasonably safe to transport him to and from his work, and a failure to perform such duty, and that plaintiff's injuries were the direct result of the negligence of the defendant in failing to furnish a good and safe handcar and in failing to inspect and keep the car in a safe condition.

Appellant's chief objection to the complaint is that as the averments show that appellee had ridden upon the car some distance immedi-

1. ately preceding the accident, that the risk and danger to him, by reason of the lurching of the car caused by the condition of its axles, etc., must have been obvious to his senses and he must, therefore, be held to have assumed the risk arising out of this condition of the car which it was alleged caused the injury. Appellee in this case had a right to rely on the presumption that appellant had performed its duty in furnishing him a safe car for his transportation to and from his work and he was not required to make an inspection of such car before using it, and it can not be said as a matter of law that, by reason of the fact alone that appellee rode on the car as averred in the complaint, he actually knew of the defect complained of unless the facts pleaded also show that they were so open and obvious that he ought to have known of them, and since such additional facts do not appear it can not be said as a matter of law that appellee assumed the risk arising out of the condition of the car. *I. F. Force Handle Co. v. Hisey* (1913), 52 Ind. App. 235, 96 N. E. 643; *Baltimore, etc., R. Co. v. Walker* (1908), 41 Ind. App. 588, 84 N. E. 730; *Salem-Bedford Stone Co. v. Hilt* (1901), 26 Ind. App. 543, 59 N. E. 97; *Cooper v. Wabash R. Co.* (1894), 11 Ind. App. 211, 38 N. E. 823.

The evidence in the case favorable to appellant shows that the car in question only lurched forward

when the car was brought to a sudden stop,

2. and the occasion of the accident was the first time during appellee's employment that the handcar was brought to a sudden stop, and that he had never before noticed such a condition of the car. The evidence also shows that the defects enumerated were not open and obvious to one looking at the car, the floor of the car covered the axles and the boxings were also covered. The defects were discovered by other section men, the time of discovery being fixed at two or three days, and maybe ten days, before the accident, when they were lifting the handcar off the track. The language of one witness is, "when we raised the body of the car one side of the truck came up where the boxing was worn." After this one of the men who made the discovery of the defects requested Singleton, the foreman, to furnish another car. Considering the evidence as a whole, we are required to hold there is evidence to support the verdict of the jury.

The trial court should not give a peremptory instruction unless the evidence favorable to the plaintiff and the reasonable inferences which

3. the jury is permitted to draw therefrom fail to support one or more of the essential averments of the complaint. Since there is evidence supporting the verdict, the court did not err in refusing to direct a verdict.

There is no evidence in the record which would justify the giving of instructions Nos. 14 and 15, and they were properly refused. Instruction

4. No. 21 requested by appellant to the effect that if the jury found that appellee was injured by reason of a negligent order given by the foreman of the section men, to put on the brake, which caused the sudden stopping of the car and the consequent injury to appellee, appellee could not recover because

the giving of such order was under the circumstances the act of a fellow servant, was so far as applicable, fully covered by instructions Nos. 12 and 13 given by the court of its own motion. It has been repeatedly held that the refusal to give an instruction is not reversible error where the subject-matter is fully covered by other instructions given. The record discloses that there was a fair trial of the case and a correct result reached. Judgment affirmed.

NOTE.—Reported in 111 N. E. 637. As to duty of master to provide safe place for servant to pass to and from work, see Ann. Cas. 1913 E 1033. As to master's liability for injury to servant by defect in handcar, see 54 L. R. A. 128, 172. As to the question of relation of the maxim of *volenti non fit injuria* as a defense unless servant's knowledge of risk is shown, see 47 L. R. A. 162. See, also, under (1) 26 Cyc 1182, 1397; (2) 26 Cyc 1196, 1447, 1454; (3) 38 Cyc 1576; (4) 38 Cyc 1617, 1711.

PARKER v. HICKMAN.

[No. 9,014. Filed February 23, 1916.]

1. **BILLS AND NOTES.**—*Action by Transferee.*—*Knowledge of Infirmities.*—*Answers.*—*Sufficiency.*—In an action on a note governed by the law merchant and transferred by indorsement before due, answers alleging defenses in favor of the maker against the original payee, but not alleging any notice or knowledge thereof on the part of such transferee, were insufficient to withstand a demurrer. p. 157.
2. **APPEAL.**—*Review.*—*Harmless Error.*—*Ruling on Demurrer.*—The sustaining of a demurrer to a paragraph of answer alleging infirmities in a note that had been transferred by indorsement before maturity, was harmless even though such answer may have sufficiently alleged notice on the part of the transferee, where there was another good paragraph covering the same fact and under which evidence was admissible without imposing any additional burden on defendant. p. 157.
3. **APPEAL.**—*Review.*—*Ruling on Demurrers.*—*Demurrers Unaccompanied by Memoranda.*—Alleged error in sustaining demurrers to certain paragraphs of answer on the ground that such demurrers were not accompanied by memoranda of defects as required by §§344, 348 Burns 1914, Acts 1911 p. 415, was unavailable in view of the fact that the rulings were right on the merits. p. 158.

4. **APPEAL.—Questions Presented.—Rulings on Demurrers.—Demurrers Unaccompanied by Memoranda.**—While the court on appeal may look beyond the memorandum of defects accompanying a demurrer for the purpose of sustaining the ruling of the trial court sustaining such demurrer, where a demurrer is overruled, and no memorandum of defects was filed therewith, the ruling presents no question on appeal. p. 158.
5. **APPEAL.—Presenting Questions for Review.—Directing Verdict.—New Trial.**—Alleged error in directing a verdict is properly presented by assignment as cause for a new trial. p. 158.
6. **BILLS AND NOTES.—Transfer Before Maturity.—Knowledge of Infirmities.—Duty to Inquire.**—Where the holder of a negotiable paper governed by the law merchant becomes possessed of the same in due course of business before maturity, for a valuable consideration without knowledge or notice of any infirmity therein as between antecedent parties, he holds it free from defenses, unless there are circumstances which excite suspicion, in which event it becomes his duty to make inquiry, and failure to do so prevents his occupying the attitude of a good-faith purchaser. p. 159.
7. **BILLS AND NOTES.—Transfer Before Maturity.—Inquiry as to Defenses.—Evidence.**—Evidence merely showing that the purchaser before maturity of a note governed by the law merchant knew the business in which the payee was engaged and that it received paper in payment for horses, and that a warranty accompanied each horse sold, was insufficient to awaken suspicion that there was likely to be a defense to the payment of such note, based upon the fact that it was given in payment for a horse which failed to comply with a warranty as to his breeding qualities. p. 160.
8. **BILLS AND NOTES.—Action.—Issues.—Evidence.—Tax Schedule.**—In an action on a note, where one of the issues raised was as to whether plaintiff was the real party in interest, and there was evidence to show that plaintiff purchased the note for full value before the commencement of the action, the tax schedule of plaintiff introduced in evidence which failed to show the listing of the note in question for taxation, constituted competent evidence against him proper to be considered upon such issue, requiring the court to submit such issue to the jury, and its failure to do so constituted reversible error. pp. 161, 163.
9. **TRIAL.—Peremptory Instructions.**—A peremptory instruction should be given only when there is a total absence of evidence upon an essential issue, or where the evidence is without conflict and the only inference to be drawn therefrom is favorable to the party asking the instruction. p. 162.

From Johnson Circuit Court; *Elba L. Branigin*,
Judge.

Action by Charles W. Hickman against Hannah Parker. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William Featherngill, for appellant.

Martin A. Quinn and *White & Owens*, for appellee.

MORAN, J.—Appellee was successful in the court below in reducing to judgment against appellant a note executed by appellant and her son, Robert H. Parker, to J. Crouch and Son, and transferred by indorsement by the payee to the Merchants National Bank of Lafayette, Indiana, and by the bank to appellee. The complaint discloses that on December 29, 1908, a note calling for \$650, with interest at six per cent per annum and attorney fees, was executed by appellant and her son to J. Crouch and Son, payable at the Citizens National Bank of Frankfort, Indiana, due September 1, 1911, and on November 27, 1909, by written indorsement the same was transferred and delivered to the Merchants National Bank of Lafayette, Indiana, and on November 4, 1911, sold by written indorsement to appellee. A copy of the note, together with the written indorsement thereon was made a part of the complaint. To the complaint, appellant addressed an answer in general denial and ten affirmative paragraphs of answer. A demurrer was sustained to the second, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of answer, leaving the third, fourth and eleventh paragraphs of answer to each of which a reply in general denial was addressed, and a second and affirmative paragraph of reply was addressed to the third and fourth paragraphs of answer. At the close of the evidence, upon appellee's motion, the court directed the jury trying the cause to return a verdict for appellee, and assess his damages in the sum of \$1,001.50, which it did.

From a judgment on the verdict, an appeal has been prosecuted by appellant, who assigns as error the overruling of appellant's separate demurrer to the second paragraph of appellee's reply to the third and fourth paragraphs of appellant's answer; the sustaining of appellee's demurrer to appellant's fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of answer; sustaining of appellee's motion to direct the verdict; and the overruling of appellant's motion for a new trial. No memoranda accompanied the demurrers to the various paragraphs of answer, pointing out the infirmities of the same, and by reason thereof, it is insisted by appellant that the court erred in sustaining the demurrer to each of the paragraphs of answer; and further that each of the answers contained facts sufficient to constitute a defence to the complaint.

Issues of fact were joined as to the third, fourth, and eleventh paragraphs of answer. The third paragraph set up suretyship as to appellant for her son, Robert H. Parker, and that without her consent, the time of payment was extended as to the note, a copy of which was made a part of the complaint; the eleventh paragraph declared that appellee was not the real party in interest; that the payee of the note never parted with the same and was at the commencement of the action the owner of the note in suit. The fourth paragraph pleads the facts, the leading allegations of which are that on December 29, 1908, appellant's comaker of the note purchased of appellee, J. Crouch and Son, a stallion for the sum of \$2,000; that the note in suit, together with another note for \$650, due September 1, 1912, was executed by Robert H. Parker, as principal, and appellant as surety. That J. Crouch and Son warranted the breeding qualities of the horse, which failed. The horse was of no value for breeding pur-

poses and the consideration failed. On April 13, 1911, in consideration of the sum of \$324.34, Robert H. Parker, who was then insolvent, was induced by J. Crouch and Son to keep the horse and surrender the warranty without the knowledge or consent of appellant. At the time appellant's comaker of the note surrendered the warranty, the Merchants National Bank held the note by a pretended indorsement, which indorsement was without consideration, and that the bank was not a *bona fide* holder of the same, and had notice and knowledge that the note was executed by appellant as surety, and that the note was executed as part payment of the purchase price of the stallion, and J. Crouch and Son had warranted the stallion to Robert H. Parker, and the note was subject to defences on account of the warranty; and J. Crouch and Son was at all times the owner of the note until after the maturity when the same was transferred to appellee.

Many of the facts pleaded in the fifth, sixth, seventh, eighth and ninth paragraphs of answer are common to the fourth paragraph, the substance of which is the foregoing. The fifth paragraph alleges, however, that as a further inducement of J. Crouch and Son to Robert H. Parker to keep the horse and surrender the warranty, J. Crouch and Son was to go with Robert H. Parker to the Merchants National Bank when the note in suit fell due and arrange with the bank to accept the sum of \$450 in full payment of the note. The sixth paragraph alleges the additional fact that J. Crouch and Son at the time of inducing Robert H. Parker to keep the horse and surrender the warranty was acting as agent of the bank, and that J. Crouch and Son agreed to get an extension of time of payment of the \$450 for 90 days beyond the date when due. The seventh and eighth paragraphs of answer allege that there was a

change and alteration of the contract without the consent of appellant, otherwise the facts follow the fourth paragraph of answer. The ninth paragraph alleges that the Merchants National Bank knew that the note was executed as part payment for a horse sold under a warranty and knew that certain equities existed between J. Crouch and Son and appellant. The tenth paragraph, after pleading practically all the facts pleaded in all the other paragraphs that go to the breach of warranty of the breeding qualities of the horse, alleges a total failure of consideration by reason thereof.

The second paragraph of reply to the third and fourth paragraphs of answer is to the effect that J. Crouch and Son, the payee of the note in suit, for a valuable consideration transferred the same by indorsement before due, in the usual course of business and for a valuable consideration, in good faith, and that the bank had no notice of any defence to the note, and the bank while the owner thereof, transferred the note by indorsement to appellee.

The note, a copy of which is filed with the complaint, is governed by the law merchant and was transferred by indorsement before due to the

1. Merchants National Bank of Lafayette, Indiana. There is nothing in the fifth, sixth, seventh, eighth and tenth paragraphs of answer alleging any notice or knowledge on the part of the bank as to the infirmities of the note relied on by appellant, as a defence thereto. In the absence of an averment of notice, they were insufficient to withstand a demurrer. *Tescher v. Merea* (1889), 118 Ind. 586, 21 N. E. 316; *Wilson v. National Fowler Bank* (1911), 47 Ind. App. 689, 91 N. E. 269. The ninth paragraph alleges that the bank knew
2. that the note was executed in part payment for a horse sold under a warranty. As to

whether this was a sufficient allegation as to notice on the part of the bank, we need not decide, as the fourth paragraph of answer covers this same fact, and under which the evidence in this connection could have been admitted without imposing an additional burden on appellant. No error was committed in overruling the demurrer to this paragraph of answer. *Lemcke v. Hendrickson* (1915), 60 Ind. App. 323, 110 N. E. 691, and authorities there cited.

There is no merit in appellant's contention that the court erred in sustaining the demurrers addressed to the various paragraphs of answer, by rea-

3. son of the failure to accompany the demurrers with memoranda, pointing out wherein the pleadings were insufficient. The rulings on the demurrers were right on the merits, and this court may look beyond the memoranda for the pur-

4. pose of sustaining rulings of the trial court. *Boes v. Grand Rapids, etc., R. Co.* (1915), 59 Ind. App. 271, 108 N. E. 174, 109 N. E. 411; *Fisher v. Groff* (1914), 182 Ind. 29, 105 N. E. 470. While on the other hand, if no memorandum is filed, as in the case at bar, as to the affirmative replies addressed to the third and fourth paragraphs of answer, the overruling of the demurrers presents no question on appeal, no objection having been pointed out to the trial court as provided by statute. Acts 1911 p. 415, §§344, 348 Burns 1914; *Dunton v. Howell* (1915), 60 Ind. App. 183, 109 N. E. 418.

We will dispose of the question as to whether the court erred in directing a verdict, under the motion for a new trial, it being properly

5. assigned as a cause thereof. *Deeter v. Burk* (1915), 59 Ind. App. 449, 107 N. E. 304. A disposition thereof will practically dispose of all questions sought to be raised under the error predi-

cated on the overruling of the motion for a new trial.

The error predicated upon the directing of the verdict calls for a review of the evidence as to the issue of fact joined on the third paragraph of answer as to whether there was an extension of time for payment of the note in controversy without appellant's consent, and the issue of fact joined on the fourth paragraph of answer as to whether appellee was a *bona fide* holder of the note, and the issue of fact joined on the eleventh paragraph of answer as to whether appellee was the real party in interest. The issue of fact joined as to the third and fourth paragraphs of answer involves the same question, Did the bank have notice that an infirmity existed as to the note in suit, or such information as would put a reasonable person upon inquiry when acting in good faith? It may be stated as a general

6. rule that where the holder of negotiable paper governed by the law merchant becomes possessed of the same in due course of business before maturity, for a valuable consideration, without knowledge or notice of the infirmity that exists as between antecedent parties, he holds it free from defences, unless there are circumstances which excite suspicion, in which event it becomes the purchaser's duty to inquire as to the circumstances surrounding its execution, and the refraining from so doing lest he should become acquainted with the infirmity of the paper, prevents his occupying the attitude of a good-faith purchaser. *Schmueckle v. Waters* (1890), 125 Ind. 265, 25 N. E. 281; *Shirk v. Neible* (1901), 156 Ind. 66, 59 N. E. 281; *State Bank, etc. v. Lawrence* (1912), 177 Ind. 515, 96 N. E. 947.

Briefly the evidence introduced in support of the issues of fact joined in the third and fourth para-

graphs of answer discloses that after the execution of the note in question, and before due, the bank purchased the same and paid full value therefor. Stating the evidence in its most favorable aspect as to the question of knowledge on the part of the bank of the infirmities of the note, it discloses no more than that the officers of the bank knew that J. Crouch and Son sold horses of the kind and character for which the note in suit was executed, and that the purchasers of such horses received warranties as to their breeding qualities. There is no evidence in the record showing that the bank had any notice or knowledge that the particular note in suit was executed in part payment for a horse, which was warranted in the particular set forth in the answers under which the evidence was admissible. The fact that the bank officers knew the business in which the payee was engaged and that it received paper in payment for horses, and that a warranty accompanied each horse sold, was not sufficient to awaken suspicion that there was likely to be a defence to the payment of the same, based upon the fact that it was given in payment or part payment for a horse, which failed to comply with a warranty as to his breeding qualities. In passing upon the sufficiency of an answer involving the question as to what was sufficient to put the purchaser of a note governed by the law merchant on inquiry, it was held in *Wilson v. National Fowler Bank*, *supra*, that the fact that the payee was a patron of the bank and ran a bucketshop, which was known to the bank, and that the payee advanced money to persons engaged in the bucketshop business did not make the answer good; and, further, it was said: "If this answer is to be upheld, it must be upon the ground of appellee's knowledge of the business in which the payee of the note was engaged, and this

is not enough to overcome the presumption that appellee, in purchasing the note, acted honestly and in good faith." There was a failure of proof on the issue of knowledge or notice on the part of the bank, or even such circumstances as would excite that degree of suspicion as a prudent person would be called upon to make inquiry as to the facts surrounding the execution of the note.

As to whether appellee was the real party in interest, or, in other words, the owner of the note when the action was commenced, appellee

8. and the bank officials testified to his purchase of the same before the commencement of the action, and that he paid full value therefor. Appellee's tax schedule was introduced in evidence with the usual affidavit attached as to the correctness of the return made to the assessor of appellee's personal property, which schedule failed to disclose the listing of the note in question for taxation, although he testified that he became the owner prior to the time of listing the same for taxation. It is pressed with much earnestness that the tax schedule was competent evidence to be considered on the question of ownership, and that it was some evidence supporting the issue joined as to the eleventh paragraph of answer, viz., that appellee was not the real party in interest, and if some evidence, the court erred in not submitting the question to the jury. A tax schedule is competent evidence as against the party making the same as to items of credits or taxables owned or claimed to be owned at the time he returned the same. *Fudge v. Marquell* (1905), 164 Ind. 447, 451, 72 N. E. 565, 73 N. E. 895; *Towns v. Smith* (1888), 115 Ind. 480, 16 N. E. 811; *Ohlwine v. Pfaffman* (1913), 52 Ind. App. 357, 100 N. E. 777; *Indiana, etc., Traction Co.*

v. *Benadum* (1908), 42 Ind. App. 121, 83 N. E. 261. It was said in the case of *Fudge v. Marquell*, *supra*, as to the question of ownership of a note where the tax schedule was admitted in evidence for two different years, and where the return of the same failed to disclose the listing of the note that, "The schedules in question were on file in the auditor's office of Delaware County. They were offered and admitted in evidence only as tending to support the issues tendered by the ninth paragraph of answer, to the effect that appellant was not the owner of the note in suit. This note was not returned for taxation in either schedule. Under the circumstances, therefore, they were admissible as tending to prove that the note was not owned by her on the first day of April of each of the aforesaid years. It could be proper to assume that her tax lists or schedules embraced all of her personal property owned by her on the first day of April of each of the respective years."

It is well settled by the authorities in this State that a peremptory instruction should be given by the trial court only when there is a total

9. absence of evidence upon an essential issue, or where the evidence is without conflict, and is susceptible of but one inference, and that inference is favorable to the party asking the instruction; in other words, the court is bound to accept as true all the facts which the evidence tends to prove, and to draw, against the party requesting the instruction, all inferences which a jury might reasonably draw, and in the event of a conflict in the evidence to consider only that favorable to the party against whom the instruction is asked, treating that favorable to the opposite party as if withdrawn. *Farmers Nat. Bank v. Coyner* (1909), 44 Ind. App. 335, 88 N. E. 856; *Hall v. Terre Haute Elec. Co.*

(1906), 38 Ind. App. 43, 76 N. E. 334; *Roberts v. Terre Haute Elec. Co.* (1906), 37 Ind. App. 664, 76 N. E. 323, 895; *Curryer v. Oliver* (1901), 27 Ind. App. 424, 60 N. E. 364, 61 N. E. 593; *Howard v. Indianapolis St. R. Co.* (1902), 29 Ind. App. 514, 64 N. E. 890; *Balzer v. Waring* (1911), 176 Ind. 585, 95 N. E. 257; *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20.

Appellee's tax schedule, which is in the record, and in the form provided by law, is so arranged that appellee was specifically interrogated

8. thereby as to notes held by him secured by mortgage and "all other notes" so held. The section of the statute (§10202 Burns 1914, Acts 1903 p. 49), in reference to the form of the schedule and the listing of the personal property by the owner, among other things, provides, "The party shall write the word 'none' after each item, whenever he has no property to assess as named in such item, and no item shall be passed without being answered". Appellee's schedule, being competent evidence to be admitted as to personal property owned by him, and the note in controversy not being listed, it must follow that it was some evidence that appellee was not the owner of the same. Even appellee's theory of the same as set forth in his brief, that, "Tax schedules are admissible to the extent that they may be regarded as admissions, but are not conclusive", makes the same some evidence, and required the trial court to submit to the jury the issue tendered by the eleventh paragraph of answer, as to whether appellee was the real party in interest, and failing to do so, constitutes reversible error. Judgment reversed, and cause remanded with instructions to the trial court to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 111 N. E. 649. As to who is a *bona fide* holder under the law of negotiable instruments, see 11 Am. St. 309. As to whether officer or corporation is chargeable with its knowledge of infirmities in commercial paper purchased from it, see 48 L. R. A. (N. S.) 65; L. R. A. 1915 D 1099. As to what circumstances are sufficient to put purchaser of negotiable paper on inquiry, see 44 L. R. A. (N. S.) 395. See, also, under (1) 8 Cyc 174; (2) 4 C. J. 932; 31 Cyc 358; (3) 4 C. J. 908; 3 Cyc 385; (4) 3 C. J. 794; 2 Cyc Anno. 689; (5) 3 C. J. 979; 29 Cyc 752; (6) 7 Cyc 943, 944; (7) 7 Cyc 956; (8) 8 Cyc 289; (9) 38 Cyc 1567.

PREMIER MOTOR MANUFACTURING COMPANY v. TILFORD.

[No. 8,938. Filed February 24, 1916.]

1. PLEADING. — *Construction.* — *Conclusions.* — *Statutory Provisions.*—Section 343a Burns 1914, Acts 1913 p. 850, does not require every conclusion stated in a pleading to be considered and treated as an allegation of the facts necessary to sustain such conclusion, but its application is expressly limited to such conclusions as are necessary to the sufficiency of the pleading, and, aside from conclusions of the latter class, all statements in the pleading not necessary to its sufficiency may be disregarded. p. 167.
2. NEGLIGENCE.—*Automobile Collision.*—*Complaint.*—*Averments.*—*Construction.*—*Motion to Make Specific.*—In an action against a corporation for injuries from collision with an automobile belonging to it, the charge in the complaint that defendant negligently operated the automobile, etc., though sufficient to make the pleading good as against demurrer, was the statement of a conclusion involving the further conclusions that the driver of the automobile was defendant's agent and that as such agent he was at the time acting within the scope of his employment, which rendered the complaint properly subject to a motion to make more specific in that respect. p. 168.
3. MASTER AND SERVANT.—*Negligence of Servant.*—*Liability of Master.*—The master is responsible for the acts of his servant done in obedience to the express orders or directions of the master, or in the execution of the master's business within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done. p. 169.
4. NEGLIGENCE.—*Automobiles.*—*Operation by Employee.*—*Liability of Owner.*—An automobile is not to be regarded in the same category with dangerous contrivances and agencies, and the owner is

not liable to one injured in a collision therewith merely because of such ownership and the fact that the driver was in his employ, if the latter was riding for his own pleasure or profit and not upon the owner's business. p. 169.

5. **NEGLIGENCE.** — *Automobile Collision.* — *Liability of Owner.* — *Master and Servant.*—*Evidence.*—In an action against an automobile manufacturer for injuries from collision with one of its automobiles, the evidence did not show the relation of master and servant between defendant and the driver of the automobile, even if it were conceded that it was shown that an agent of defendant, with authority to do so, had made an arrangement with such driver whereby the latter was to receive a commission on sales of automobiles made by him, where defendant had no right to manage, direct or control the time, manner or method of making such sales, since the right to in some way manage, direct or control the servant in his work is an essential element of the relation of master and servant; and, such relation not being shown, the refusal to direct a verdict for defendant was error. p. 170.

From Superior Court of Marion County (91,203);
Pliny W. Batholomew, Judge.

Action by Mary Tilford against the Premier Motor Manufacturing Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

John B. Elam, J. W. Fesler, Harvey J. Elam and Howard S. Young, for appellant.

Alvah J. Rucker and James E. Rocap, for appellee.

HOTTEL, J.—This is an appeal from a judgment of \$1,000, recovered by appellee in a suit brought by her against appellant for personal injuries alleged to have resulted from a collision between one of appellant's automobiles and a buggy in which appellee was riding. The issues of fact were tendered by a complaint in one paragraph and a general denial. The averments of the complaint necessary to an understanding of the questions presented by the appeal are in substance as follows: The appellant is a corporation engaged in the manufacture of automobiles in the city of Indianapolis. On August 12, 1911, the time of the collision complained of, appellant had in its employ the driver of the automo-

bile who was at the time the agent of appellant acting "under the scope of his employment". The automobile was being driven by such agent south over Central Avenue, near its crossing with 56th Street in the city of Indianapolis, "at the negligent and careless rate of speed of fifty miles an hour more or less" and said agent "negligently and carelessly caused said automobile to collide with and strike this plaintiff's vehicle in which she was riding." The collision occurred after sundown, about 8 o'clock in the evening, and it was dark. Appellee "was proceeding in a northerly direction upon said public thoroughfare and upon the right-hand side thereof near said intersection of said 56th Street; said defendant was propelling its said automobile which struck this plaintiff upon and over said public thoroughfare in a southerly direction without having lighted lights upon said automobile and without having a warning signal attached to said automobile and negligently and carelessly collided with this plaintiff and struck this plaintiff with said automobile at said time; * * * that said defendant at such times was operating said automobile at said negligent rate of speed and without said lighted lights and negligently and carelessly ran said automobile upon, against and over said plaintiff from said northerly direction without giving any warning to this plaintiff of the approach of said automobile at a time when plaintiff was unconscious and unaware of the approach towards her of said automobile, and at said time plaintiff was in full view of said defendant; that defendant at such time negligently and carelessly failed to warn plaintiff of his approach towards her and negligently and carelessly failed and omitted to get said automobile under control", etc. Prayer for \$25,000 damages.

Appellant filed a motion to make the complaint

more specific by stating what the driver of the automobile was doing for it when the collision occurred and the facts upon which appellee based the conclusion stated in the complaint that at said time such driver was the agent of appellant acting within the scope of his authority. This motion was overruled. The ruling on this motion and appellant's motion for new trial are relied on for reversal.

Appellant insists, in effect, that since the passage of the act approved March 15, 1913 (Acts 1913 p. 850, §343a Burns 1914), the court is required

1. to consider and give the pleader the benefit of all the averments of his complaint though made by way of conclusion; that, as the only remedy against such practice, such act contains a proviso authorizing a motion to require the pleader to state the facts on which his conclusion is based; that by reason of such act and the proviso therein it is now the imperative duty of the trial court to sustain such a motion when the averments of the pleading to which it is addressed are such as to make it proper and appropriate, and that the overruling of such a motion under such circumstances constitutes an error, which, when properly presented on appeal, will necessitate a reversal of the judgment of the trial court. The act, *supra*, does not require every conclusion stated in a pleading to be considered and treated as an allegation of the facts necessary to sustain such conclusion, but expressly limits its application to such conclusions as are necessary to the sufficiency of the pleading. As to conclusions unnecessary to the sufficiency of a pleading the law remains as it has always been, viz., any statement in a pleading whether made by way of conclusion, or by direct averment of fact, if unnecessary to the sufficiency thereof, may be disregarded and hence any ruling on a motion to make such an

averment more specific would be necessarily harmless.

In a sense the averment complained of as being a conclusion was not necessary to the sufficiency of the pleading; that is to say, the italicized

2. averments, *supra*, which charge the *appellant* with negligently operating the automobile, etc., were sufficient to make it good as against demurrer, but when the complaint is read in its entirety we know that appellant is a corporation, and that it could not operate the automobile except by and through the driver thereof as its agent, and we know that in order to make appellant liable for such operation such driver must have acted within the scope of his employment. The averment that appellant operated the automobile when read in the light of the other averments, as it should be, was itself a conclusion, which involved both the conclusion that the driver of the automobile was appellant's agent, and the further conclusion that as such agent he was acting within the scope of his employment when operating said automobile. The pleader ought not to be relieved from stating the facts upon which a conclusion in his pleading is based, when such conclusion is necessary to the sufficiency of the averments in connection with which it is made, simply because such pleading happens to be rendered sufficient against demurrer by reason of another conclusion which is broader than, and includes, the former conclusion. In the sense which we have indicated and as affecting the averments of the complaint in aid of which it was pleaded, said conclusion was necessary to the sufficiency of the complaint and for this reason the court below should have sustained the motion to make more specific. In view, however, of our disposition of other questions presented by the appeal we need not determine

whether the error resulting from the ruling on said motion should be treated as harmless.

In support of its second assigned error the principal question raised by appellant is whether it was responsible for the acts of the driver of the automobile. Appellant insists in effect that the evidence, upon such question, is not sufficient to sustain the decision of the trial court, and that such ground of its motion for new trial, and also that ground of its motion which challenges the action of the trial court in refusing to give a peremptory instruction in its favor, presents reversible error. The law

3. applicable to this question may be stated as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instruction given, and the circumstances under which the act is done, the master is responsible." *Colwell v. Aetna Bottle, etc., Co.* (1912), 33 R. I. 531, 82 Atl. 388, 391, and cases cited; *Richie v. Waller* (1893), 63 Conn. 155, 28 Atl. 29, 38 Am. St. 361, 27 L. R. A. 161.

Automobiles are not to be regarded in the same category with locomotives, ferocious animals, dynamite and other dangerous contrivances and agencies. *Hartley v. Miller* (1911), 165 Mich. 115,

4. 130 N. W. 336, 33 L. R. A. (N. S.) 81; *Cunningham v. Castle* (1908), 127 App. Div. 580, 111 N. Y. Supp. 1057; *McNeal v. McKain* (1912), 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; *Neubrand v. Kraft* (1915), 169 Iowa 444, 151 N. W. 455, 56 L. R. A. (N. S.) 691, annotated note and cases there cited. Appellant was not liable merely because it was the owner of the automobile, and

the driver thereof was in its employ. Such facts do not make the owner of the automobile liable for injuries caused by the driver's negligence while such driver was riding for his own pleasure or profit and not upon the owner's business. *Ludberg v. Barghoorn* (1913), 73 Wash. 476, 131 Pac. 1165; *Siegal v. White Co.* (1913), 81 Misc. 171, 142 N. Y. Supp. 318; *Power v. Arnold Engineering Co.* (1911), 142 App. Div. 401, 126 N. Y. Supp. 839; *White Oak Coal Co. v. Rivoux* (1913), 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Ann. Cas. 1914 C 1082, and cases cited; *Danforth v. Fisher* (1908), 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. 670; *Colwell v. Aetna Bottle, etc., Co.*, *supra*, and cases there cited. While it may be true, as many

of the decided cases in other jurisdictions indicate, that the fact that the automobile was admitted to belong to the appellant and that the driver was in the employ of the appellant and operating the automobile with appellant's knowledge and consent, in the absence of anything to the contrary, was sufficient to give rise to the inference that the relation of owner and chauffeur existed between appellant and such driver, and hence sufficient to put the appellant upon proof that the automobile was not used in his business or for his employment (Davids, *Motor Vehicles* §209; *Knust v. Bullock* [1910], 59 Wash. 141, 109 Pac. 329; *Kneff v. Sanford* [1911], 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.* [1912], 66 Wash. 676, 120 Pac. 519); nevertheless the liability of appellant for injuries occasioned by the negligence of such driver depended upon the existence between appellant and such driver of the relationship of master and servant, and where "it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the

injury in the defendant's employment or upon his business, and was being used by some other person on business of his own, and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment." *Ludberg v. Barghoorn, supra*. See, also, *White Oak Coal Co. v. Rivoux, supra*; *Dauids, Motor Vehicles* §209. Duncan, the driver, under his own statement obtained a loan of the machine for his own accommodation and benefit, and neither the purpose for which he was using the automobile at the time of the collision, nor the relation which he sustained to appellant on account of such use, at such time, was in any way affected by any previous arrangements shown by the evidence to have been made between him and appellant's salesmen whereby he was to obtain a part of the commission of such salesmen on sales of automobiles made by him. Even though it be conceded that some agent of appellant, having authority to do so, entered into an arrangement or agreement with Duncan whereby the latter was to receive a commission on sales of automobiles made by him, such arrangement, leaving the time, manner and method of making such sales wholly with Duncan, with no right in appellant to in any way manage, direct or control him in the matter of making such sales, would not be sufficient to create between appellant and Duncan the relation of master and servant. This is necessarily so because the right to in some way manage, direct or control the servant in his work is one of the elements essential to the relation of master and servant. 1 *Labatt, Master and Servant* §2 and authorities cited in note.

For the reasons indicated we are of the opinion that the evidence in this case wholly fails to show the relation of master and servant existing between appellant and Duncan at the time of the collision

which resulted in appellee's injury and hence fails to show any liability on the part of appellant for Duncan's alleged negligence in the operation of the automobile. It follows that the evidence is not sufficient to sustain the verdict of the jury, and that the trial court should have given appellant's peremptory instruction, and hence that such court erred in overruling appellant's motion for a new trial.

Appellant also insists that other instructions tendered by it should have been given, but there seems to be no necessity for our determining whether error was committed by the court's refusal to give them, because appellee in effect concedes that they in the main stated the law correctly, and insists that they were covered by the instructions given.

For the error indicated the judgment below is reversed with instructions to the trial court to sustain appellant's motion to make the complaint more specific and its motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 111 N. E. 645. As to liability of master to third persons for act of servant outside scope of employment, see 133 Am. St. 869. As to liability of owner of automobile for acts of his chauffeur or agent, see 10 Ann. Cas. 732, 12 Ann. Cas. 972, Ann. Cas. 1916 A 659. As to automobiles as inherently dangerous machines, see 19 Ann. Cas. 1229. See, also, under (1) 31 Cyc 49, 68; (2) 31 Cyc 280, 650; (3) 26 Cyc 1518, 1525; (4) 26 Cyc 1536; 28 Cyc 38; (5) 26 Cyc 1519, 1577.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. ELLIS.

[No. 8,662. Filed November 16, 1915. Rehearing denied February 24, 1916.]

1. RAILROADS.—*Injuries to Persons on Premises.—Complaint.—Sufficiency.*—A complaint for injuries to plaintiff by the frightening of his team while unloading freight from a car on defendant's track, alleging facts to show that plaintiff was rightfully unloading defendant's car and therefore rightfully on the premises, and averring that the acts of defendant were carelessly and negligently done,

was sufficient against the objection that it did not show a duty owing by defendant to the plaintiff, and did not show that a depression at the side of the approach to the track, into which plaintiff's wagon was thrown, could have been constructed differently, etc., since, while rightfully on the premises and in going from there to a place of safety, defendant owed plaintiff the duty of exercising such care for his safety and protection from its moving trains as an ordinarily prudent person would exercise under like circumstances, and the averments that the acts of defendant were negligently done amounted to a charge that defendant failed to use due care and also carried with them the idea that there was a way in which such acts could have been carefully done. p. 176.

2. *APPEAL.—Review.—Harmless Error.—Instructions.*—Instructions given, and objected to, on the ground that they were not applicable to the evidence under the issues, afforded appellant no reason to complain, where it appeared they required more from appellee than was necessary to support his case, and were more favorable to appellant than it was entitled to. p. 177.
3. *RAILROADS.—Injuries to Persons on Premises.—Frightening Team.—Duty of Defendant.—Instructions.*—In an action for injuries to plaintiff by the operation of defendant's train so as to frighten plaintiff's team while he was unloading freight from a car, an instruction on the duty owing plaintiff while rightfully on the premises which in effect told the jury that if plaintiff was free from contributory negligence defendant was liable in damages if it ran its train so as to scare his horses, was erroneous in that it imposed liability regardless of the degree of care exercised in running the train. p. 177.

From Jay Circuit Court; *Charles E. Sturgis*, Special Judge.

Action by William E. Ellis against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

G. E. Ross, for appellant.

John F. Lafollette and *Emerson McGriff*, for appellee.

IBACH, P. J.—This appeal is from a judgment for \$2,000 rendered in favor of appellee upon the verdict of the jury. The following are the facts of the case, the essentials of which are admitted by appellant: At Redkey appellant has a track con-

necting its main tracks with the tracks of the Lake Erie and Western Railroad. This Y track crosses Union Street in said town practically at right angles, that is, Union Street runs north and south through the town and the Y at the point where it crosses Union Street runs in an east and west direction. To the west of this street is Noble Street, the north end of which terminates at the right of way of appellant. From Union Street westward for a short distance toward Noble Street, appellant had built a driveway along the south rail of the Y to accommodate its patrons in loading and unloading cars, which were frequently located at that point on the Y track for that purpose. Appellant had raised the grade of its roadbed through Redkey and had constructed approaches to the crossing where its road crossed Union Street, and had also constructed an approach from the driveway to connect with this street, but in so doing it had left a depression or low place from two to three feet deep along the south line of the driveway. On September 22, 1911, appellee had delivered to the agent of a canning factory a wagonload of tomatoes at another point along appellant's tracks to be shipped to Marion, Indiana. When he had unloaded his wagon he inquired of such agent where he could get some empty crates, and was informed by him that appellant had set a car of empty crates along the driveway above described, to be delivered to its customers and he could obtain from this car all the crates he desired. The car was stationed from ten to twenty feet west of Union Street along such driveway and from the point where the car was placed to Union Street such driveway was ten feet wide, that is there was a distance of ten feet between appellant's tracks and the depression or low place along the south side of such driveway. Appellee

drove his team and wagon to the car and was about to place the last crate on his wagon to complete his load when appellant's brakeman ordered him to get out of the car, that it was about to be moved away. He seized his lines to drive out from between the car and the depression on the driveway, but before he could drive away from the car appellant backed a train on the Y track without any further warning. The train was backing from the east and appellee was compelled to drive east to get away from the car and backing train, and while so doing his wagon was run against and thrown into the drop or depression and he was thrown out of the wagon to the ground and his wagon ran over him seriously injuring him.

In each paragraph of the complaint the negligence charged against appellant is characterized in this manner: "In the construction of the approach to its said road from the south along Union Street and where defendant's track crossed Union Street * * * had negligently and carelessly built such approach from the south so that there was a drop or depression from two to three feet deep at the point where said approach from the southward on Union Street connected with and intersected the approach from the westward and was maintaining negligently and carelessly said approach on said day at the time of the plaintiff's injury. * * * Also defendant had negligently and carelessly placed and set said car on said Y at a point where the east end of said car stood about ten feet west to the west line of Union Street. * * * That defendant negligently and carelessly ran its locomotive engine and cars upon and along said Y toward plaintiff and his team of horses without any signal or warning of any kind or without any person on the end of the train and negligently and carelessly continued to run said locomotive engine and cars toward plaintiff and his

team while he was in said position and by reason of such negligence and carelessness on the part of defendant, its agents and employes, plaintiff's horses were frightened and scared," etc. The complaint is very long, but we have set out the material averments of each paragraph.

It is first contended by appellant that neither paragraph contains any facts showing a duty owing by it to appellee, nothing to show how the

1. approaches could have been constructed differently or how it could have been constructed so as to avoid the drop or depression in the driveway. There is a sufficient showing that appellee was rightfully unloading appellant's car and was, therefore, rightfully on the premises of appellant, and while there and in going from that place to a place where he would not be in danger of coming in contact with a moving train, appellant owed appellee the duty of exercising such care for his safety and protection from its moving trains, as an ordinarily prudent person would exercise under like circumstances. The averments also that the acts of appellant were carelessly and negligently done, were sufficient. Such averments themselves carry with them the idea that there was a way in which such acts could have been carefully done and such allegation amounts to a charge that the defendant failed to use due care. *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739. The averments of the complaint sufficiently show a duty resting upon appellant to exercise care toward appellee, and a failure to perform such duty and injury resulting from such failure. Applying to the facts of the case these principles of law, we are satisfied that the separate demurrers to each paragraph of the complaint were properly overruled.

There is evidence in the record supporting all the facts above enumerated. It is contended, however,

by appellant that the charge is that appellant negligently backed its train into the car in question while appellee was engaged in unloading the car, but there was no evidence to support such charge and therefore the instructions of the court given upon that theory were not applicable to the evidence under the issues. If so, appellant has no reason to complain, because they required more from appellee than was necessary to support his case, and were therefore more favorable to appellant than it was entitled to.

As to instruction No. 4 given by the court of its own motion, the position of appellant must be supported. This instruction informs the jury

that if appellee was in a place where he had a right to be, then it was the duty of appellant to use reasonable care to protect him from injury, and if it finds that while appellee was in a place where he had a right to be, unloading tomato crates from a car on the Y track to his wagon which he had driven alongside the track, and that appellant knowing of appellee's position and knowing that appellee's position was dangerous ran its engine and cars toward appellee, and scared and frightened his horses, causing them to run away and injure him, without appellee being guilty of contributory negligence, then it should find for appellee. The effect of this instruction was that if appellee was free from contributory negligence, appellant was liable in damages if it ran its engine so as to scare his horses, regardless of the degree of care it was exercising in the running of the engine. This was error and we must presume that it worked harm to appellant. For the giving of this instruction the judgment is

reversed, and the cause remanded for new trial. Moran, J., did not participate.

NOTE.—Reported in 110 N. E. 228. As to the distinction between licensee and invitee, see Ann. Cas. 1913 C 569. As to liability of railroad company for injury resulting from act of shipper or consignee in setting car in motion, see 51 L. R. A. (N. S.) 888. As to liability of a railroad company for personal injury caused by frightening horses by train or cars, see 3 Ann. Cas. 1070; 10 Ann. Cas. 302; Ann. Cas. 1913 B 293. As to persons loading or unloading cars as licensees, see 1 Ann. Cas. 601; 12 Ann. Cas. 119. See, also, under (1) 33 Cyc 865; (2) 4 C. J. 918; 38 Cyc 1809; (3) 33 Cyc 910.

GASAWAY ET AL. v. CITY OF LAFAYETTE.

[No. 9,106. Filed October 8, 1915. Rehearing denied November 3, 1915. Transfer denied February 24, 1916.]

QUIETING TITLE.—*Laches*.—*Findings*.—*Review*.—In a suit for possession and to quiet title to certain real estate conveyed by plaintiffs' ancestor to defendant city for a market place, upon condition that on ceasing to use the same for a market place title should revert to the grantor, plaintiffs were guilty of such laches as to preclude a reversal of the judgment of the trial court for defendant, where the special finding disclosed that during the lifetime of the original grantor the use of the property for a market place was abandoned, that the city continued to assert title, and that thereafter during a period of thirty-nine years, the property was used and occupied as a street, while public and private rights resulting from such use had intervened to such extent that a reversal would result in hardship, litigation and needless expense.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by Katherine Gasaway and others against the city of Lafayette. From a judgment for defendant, the plaintiffs appeal. *Affirmed*.

M. E. Clodfelter, Hanna & Hall and *William W. Ulrich*, for appellants.

Arthur D. Cunningham and *Charles R. Pollard*, for appellee.

SHEA, C. J.—Appellants, as the only surviving heirs of Aaron T. Claspill, brought this action to

recover the possession of and to quiet title to certain real estate in the city of Lafayette, Indiana. An answer in general denial to the second paragraph of complaint formed the issues submitted to the court for trial. Upon proper request, the court made a special finding of facts the substance of which is as follows: On April 19, 1847, Aaron T. Claspill was the owner in fee and in possession of the real estate in controversy, and on that date by deed, in which his wife joined, conveyed the real estate to the town (now city) of Lafayette, Indiana. The warranty deed, which is set out in the special findings omitting the formal parts reads as follows:

“This Indenture made this nineteenth day of April, A. D. Eighteen hundred and forty-seven, Aaron T. Claspill and Flora Claspill, his wife, of the county of Tippecanoe, in the State of Indiana of the first part and the President and Trustees of the town of Lafayette in said State and their successors in office of the second part, witnesseth that the said party of the first part in consideration of the sum of two hundred dollars to them in hand paid by the said Party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part and their successors in office and assigns forever, all that certain tract or parcel of land, lying in the county of Tippecanoe and state of Indiana towit: Thirty feet off of the east end of lot number ninety-seven (97) in the original plat of the town of Lafayette, the same fronting sixty-six feet on Mississippi Street in said town this grant being upon the condition that said ground be and forever remain open as a public Market Space and in case the same should ever hereafter be diverted to any other use or purpose the same is to revert back to the said grantor, his heirs and assigns, forever, to have and to hold the premises and appurtenances

above described to the said party of the second part and their successors in office and assigns forever, * * *”.

Appellee town took possession of the real estate and has ever since and now has possession thereof. It is specially found by the court that the deed was made and executed upon the following conditions, inserted therein:

“This grant being upon the condition that the said ground be and forever remain open as a public market space, and in case the same should ever hereafter be diverted to any other use or purpose, the same is to revert back to the said grantor, his heirs and assigns forever.”

That in 1853 the town of Lafayette adopted the city form of government, and, thereafter became the city of Lafayette, with a mayor as chief officer, city council and city attorney through which the public business was conducted and administered; that there was never any markethouse erected upon the real estate described in the complaint, and same was not used as a market space since the year 1873, but was used as a street and public throughfare, from that period and for some years prior thereto; that at one time an open market space was maintained by the city of Lafayette and certain benches or tables were kept and maintained by the city for the use of dealers for the purpose of displaying their goods thereon, but the court finds from the evidence that the benches were placed near the tracks of the Monon railway in Fifth Street as platted in the original plat, and not upon the lands described in the complaint or any part thereof; that these benches were removed from Fifth Street about thirty-nine years ago, prior to 1874, and there has never been any public market in the city of Lafayette either

upon Fifth Street as platted or upon the lands described in the complaint since the removal of the benches.

The market space consists of a strip of land thirty feet wide, off the east end of lots 97 to 100 inclusive, in the original plat of the town of Lafayette, and extended the full length of a block from Columbia to Main Street. Findings Nos. 11 to 16 inclusive relate to certain improvements and plans for the improvement of Fifth Street, including the market space, and in finding No. 16 the improvement is found to have been completed on August 12, 1895. Thereafter, in making improvements upon Fifth Street, the common council of the city claimed the whole of the market space as a street under the name of Fifth Street, and in making improvements thereon referred to the same by resolution as Fifth Street. On June 13, 1898, the common council adopted an ordinance for the improvement of Fifth Street from Columbia Street to Main Street by the construction of a cement sidewalk nine feet six inches in width on the west side of the street and the cost of constructing the improvement was assessed against the abutting owners of the real estate.

It is found that since the abandonment and non-user of a public market thirty-nine years or more ago the city has claimed title and ownership and has had uninterrupted possession of and has exercised control over the real estate in controversy, adverse to appellants' interests, and such claim of ownership has been undisputed during all of said time until the demand made by appellants on the city October 22, 1912; that since 1853 the so-called market space has been more or less used by the traveling public as a street, by drivers of vehicles and pedestrians; that it is located in the heart of the business district and forms an indispensable connection between Main

Street and Columbia Street and means of approach to the business houses located upon the west side of Fifth Street between Main and Columbia Streets; that to discontinue the use of the street and deprive the traveling public of this means of reaching the various points which it connects would inflict irreparable injury; that the general traveling public, both pedestrians and users of vehicles, have become habitual users of this thoroughfare and public business has been shaped with reference to such usage, all of which has been done with the full knowledge of a portion of appellants or those claiming under them, and was so used during the lifetime of Aaron T. Claspill. It is also set out in detail in the findings of fact that all the real estate has been improved by the erection thereon of permanent and substantial buildings of brick or concrete, some of which were erected as long ago as 1875, occupied as business houses, etc., and that there is no other street which can furnish a means of ingress to or egress from certain of the buildings. The relationship of appellants to Aaron T. Claspill is set out in detail in finding No. 22; that on November 10, 1912, appellants served a demand for the possession of the real estate, in writing, on the mayor of the city, and on the same day demanded of the mayor and common council possession of the real estate, claiming title thereto on account of the breach in the condition of the deed for failure to keep and maintain the lot as a market space, but the court finds that appellee refused to deliver possession of the real estate to appellants. It is also found that all of appellants except Dora Miller are and have been nonresidents of Indiana for periods varying from their birth to thirty-one years; that the value of the real estate in controversy is \$9,000.

Upon these facts, conclusions of law were stated as

follows: That the law is with appellee and appellants have no right, title to, or interest in the real estate or any part thereof. Appellants' motion for a *venire de novo* was overruled, also their motion for a new trial. It is assigned that the court erred in its conclusions of law upon the facts found, and in overruling appellants' motion for a *venire de novo* and for a new trial.

All the questions presented in this case on behalf of appellants are technical. The facts are fully set out herein, and show clearly that during the lifetime of the original grantor, Aaron T. Claspill, he permitted the property to be abandoned for market uses, and to be used as a public street. His heirs could have no greater rights than he had. The property has been in the possession of the city, as found, for a period of thirty-nine years. Public, as well as private rights have intervened to such an extent that a reversal of this cause would result in hardships, litigation and needless expense. Appellants and their ancestors have been guilty of such laches as to prevent this court from overruling the decision of the trial court on the merits of the cause. Judgment affirmed.

NOTE.—Reported in 109 N. E. 789. As to deeds restricting use of premises to specified purpose, see 95 Am. St. 223. See, also, 32 Cyc 1345, 1385.

UNION TRACTION COMPANY OF INDIANA v.
THOMPSON.

[No. 8,956. Filed February 25, 1916.]

1. DEEDS.—*Covenants Running With Land.*—*Maintenance of Fences.*—Provisions in deeds to maintain fences are covenants running with the land. p. 185.
2. RAILROADS.—*Interurban.*—*Fencing Right of Way.*—*Statutes.*—*Contracts.*—There is no duty resting on an interurban railroad company to maintain fences along its right of way, save as imposed by §5707 Burns 1914, Acts 1903 p. 426, expressly providing that it

does not change any existing contract; hence, the covenant in a conveyance made in 1901 to an interurban railroad company binding grantor to maintain a fence along defendant's right of way, precluded plaintiff, who was a tenant of one to whom such grantor conveyed the remainder of his land, from recovering damages against such railroad company for stock killed, on the theory that it was negligent in failing to keep the fence in repair. p. 185.

3. RAILROADS.—*Animals on Tracks.—Liability for Injury.—Statutory Provisions.—Interurban Railroads.*—Sections 5436-5443. Burns 1914, Acts 1863 p. 25, Acts 1877 [s. s.] p. 61, relating to the liability of railroads for the killing of stock on their tracks, and §§5447-5450 Burns 1914, Acts 1885 p. 224, relating to the fencing of railroads, have no application to interurban railroads, and all legislation having application to interurban railroads expressly so states. p. 185.

From Madison Circuit Court; *Charles K. Bagot*, Judge.

Action by Robert S. Thompson against the Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Kittinger & Diven and *J. A. Van Osdol*, for appellant.

Albert H. Vestal, for appellee.

IBACH, C. J.—This action was to recover damages for two cows alleged to have been injured by appellant's car because of appellant's negligence in failing to keep in repair the fence between its right of way and the lands of appellee's landlord. The cause was tried on an agreed statement of facts which showed that the fence was out of repair, to appellant's knowledge; that the former owner of the land had conveyed in 1901 by a deed which was of record, certain land to appellant upon condition that appellant was to construct a good substantial woven wire fence on the east line of its right of way, which the grantor bound himself, his heirs and assigns to maintain; that appellant constructed a good substantial fence; that appellee, who was a tenant of the then owner of the land, did not know of

the agreement that the owner's grantor had made for the maintenance of the fence. There was an agreement that the cows got on the track because the fence was out of repair, and were injured by appellant's car, and that appellee was damaged in the sum of \$95. Judgment was rendered for appellee. Pro-

visions in deeds to maintain fences are covenants running with the land. *Hazlett v. Sinclair* (1881), 76 Ind. 488, 40 Am. Rep. 254; *Toledo, etc., R. Co. v. Cosard* (1893), 6 Ind. App. 222, 33 N. E. 251; *Midland R. Co. v. Fisher* (1890), 125 Ind. 19, 24 N. E. 756, 21 Am. St. 189, 8 L. R. A. 604; *Lake Erie, etc., R. Co. v. Priest* (1892), 131 Ind. 413, 31 N. E. 77. Therefore, the duty to maintain the fence along appellant's right of way passed to appellee's landlord with the conveyance of the land to him.

There is no duty resting on an interurban railroad company to maintain fences along its right of way, save as imposed by the act of 1903. Acts 1903 p. 426, §5707 Burns 1914. This statute

2. expressly provides that it does not change any existing contract. It appears from the statement of facts that the contract for the building of the fence by appellant and its maintenance by the grantor of appellee's landlord, and such grantor's heirs and assigns, was made in 1901. Since the duty of maintaining the fence along the right of way was on appellee's landlord, and not on appellant, it follows that appellee has no right to recover damages from appellant for stock killed on its right of way, on the theory that appellant was negligent in failing to keep the fence in repair. The acts of 1863

3. and 1877 (Acts 1863 p. 25, Acts 1877 [s. s.] p. 61, §§5436-5443 Burns 1914, relating to the liability of railroads for the killing of stock on their tracks, and the act of 1885 as to the fencing of rail-

roads (Acts 1885 p. 224, §§5447-5450 Burns-1914), apply only to steam railroads, and not to interurban railroads. As said in the case of *Hughes v. Indiana Union Traction Co.* (1914), 57 Ind. App. 202, 105 N. E. 537, "Every privilege conferred and every duty imposed on interurban railroads has been by legislative enactment, although in most instances kindred privileges and kindred duties had prior thereto been conferred on steam railroads. In every act of the legislature where it is intended that the privileges extended or duties imposed upon steam railroads shall apply alike to interurban or street railroads, it has been so stated."

The decision of the court was contrary to law, and appellant's motion for new trial on that ground should have been sustained. Judgment reversed.

NOTE.—Reported in 111 N. E. 648. As to covenants, in respect to fencing, running with the land, see 82 Am. St. 677. As to whether covenant running with land may be created by acceptance of deed poll with stipulations purporting to bind grantor, see 6 L. R. A. (N. S.) 436. As to right of action against railroad company for violation of statutory duty to fence right of way, see 9 L. R. A. (N. S.) 347. See, also, under (1) 11 Cyc 1090; (2) 33 Cyc 1174.

PARKER v. STATE OF INDIANA.

[No. 9,467. Filed February 25, 1916.]

APPEAL.—*Application for Certiorari.—Refusal of Application.*—

Where defendant appealed from a judgment of conviction imposed by the juvenile court, and the judge of such court did not file his special findings until twenty-five days after judgment was rendered, thus leaving but five days to defendant in which to procure the filing of a bill of exceptions containing the evidence and to perfect his appeal as required by §1635 Burns 1914, Acts 1907 p. 221, defendant could not procure a writ of *certiorari* calling for such bill of exceptions on the filing of the transcript without same, although he made a showing that he could not know until the findings were filed that a transcript of the evidence would be necessary, since the statutory limit on the time for perfecting an appeal is jurisdictional, and the hardship resulting from such provisions is beyond the province of the court to remedy.

From Juvenile Court of Marion County (10,481a);
Frank J. Lahr, Judge.

Prosecution by the State of Indiana against Cecil Parker. From a judgment of conviction, the defendant appeals and applies for a writ of *certiorari*.
Application denied.

Donald S. Morris, for appellant.

Evan B. Stotsenburg, Attorney-General for the State.

MORAN, J.—The question before us at this time arises on an application for a writ of *certiorari*. A history of the proceedings antedating the filing of this application is necessary to an understanding of the questions here presented. On September 8, 1915, an affidavit was filed with the clerk of the juvenile court of Marion County, Indiana, charging the appellant with the crime of unlawfully encouraging the delinquency of one Delilah Wells, a girl under the age of sixteen years, pursuant to §1648 Burns 1914, Acts 1907 p. 266. Such further steps were taken that a trial was had in the juvenile court of Marion County and, on October 23, 1915, appellant was found guilty by the court of the crime charged, and in addition to a fine, he was sentenced to the Indiana State Farm for six months. On October 25, 1915, a motion for a new trial was filed, and on November 2, 1915, the same was overruled by the court, and, on the following day an appeal was prayed to this court, bond filed and approved. On November 19, 1915, the juvenile court filed its special finding of facts, as provided by statute (§1635 Burns 1914, Acts 1907 p. 221), to which appellant excepted and was granted fifteen days' time in which to prepare and file a bill of exceptions containing the evidence. On November 22, 1915, a transcript of all the proceedings had in the

juvenile court up to that date was filed in this court, which transcript did not contain a bill of exceptions containing the evidence. On November 29, 1915, a transcript of the evidence was filed with the trial court, and on January 12, 1916, the same was settled, signed and filed by the court, thereby becoming a bill of exceptions. To bring this bill of exceptions into the record, together with certain order book entries made and corrected since the transcript was filed in its present form is the relief sought by the application for a writ of *certiorari*.

The section of the statute (§1635 Burns 1914, *supra*), authorizing an appeal to this court provides among other things that the party appealing shall file a transcript in the office of the clerk of the Supreme Court within thirty days from the date of the rendition of the judgment appealed from, and in this connection it became the duty of the juvenile court to certify the facts in the form of a special finding, and in case the party appealing desired to question the sufficiency of the evidence to warrant the finding thus made, the evidence should have been incorporated into a bill of exceptions filed in the juvenile court and made a part of the record. The judgment of conviction was entered of record as we have seen on October 23, 1915, and under the statute appellant had thirty days from this date to perfect his appeal, and with this statute in mind, he filed a partial transcript of the proceedings, together with an assignment of error, in the office of the clerk of the Supreme Court, on November 22, 1915. The bill of exceptions containing the evidence was not on file with the clerk of the juvenile court on this date, as he so states in his certificate attached to the partial transcript of the proceedings. The application, so far as it relates to the bill of exceptions containing the evidence is not to send up a corrected entry,

nor to cure an infirmity in the proceedings growing out of a mistake or inadvertence on the part of the clerk or the court, or by reason of any fraud being practiced upon appellant; but to send up the entire bill of exceptions containing the evidence filed, as aforesaid, after the time had elapsed for perfecting the appeal. A writ of *certiorari* can not be made to serve this purpose. The time in which to perfect an appeal is jurisdictional. Elliott, App. Proc. §111.

The difficulty here seems to have been by reason of the lack of time in which to get the transcript of the evidence to the trial court, as the statute allows but thirty days in which to perfect an appeal in this class of cases. It is true that appellant's counsel contends that he did not know that he would desire a transcript of the evidence until the juvenile court filed its special findings of facts, which was twenty-five days after the rendition of the judgment, leaving but five days to have the transcript of the evidence prepared, settled, signed and incorporated in a bill of exceptions. We are not unmindful that in the denial of the writ, it denies appellant a right of review of his cause so far as it relates to the question that he desires to present on the evidence. Regardless of the views of the court, however, it is not within our province to remedy hardships which grew out of statutory enactments. These are matters which may with propriety be addressed to the lawmaking body of the State. All the relief that appellant asks is addressed to the bill of exceptions and the entries connected therewith. The application for a writ of *certiorari* is denied.

NOTE.—Reported in 111 N. E. 631. See 12 Cyc 802; 6 Cyc 763.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. STOUTER.

[No. 8,955. Filed March 8, 1916.]

1. CARRIERS.—*Carriage of Freight.—Liability.*—The liability of a carrier transporting merchandise does not terminate until such merchandise is unloaded from the car and delivered to the consignee, or is placed in a storehouse for that purpose; and, where the character of the shipment renders it impracticable or impossible of placement in the storehouse, the liability of the carrier as such does not end, in the absence of a contract to the contrary, until the car containing the merchandise is located at the place of destination where such cars are usually unloaded, or at some other convenient place at the request of the consignee. p. 192.
2. CARRIERS.—*Carriage of Freight.—Liability as Warehouseman.*—Where the evidence showed that a shipment of onions was not removed to a storage house, and there was no evidence to show that it was ever located on one of defendant's unloading tracks, or any other safe and convenient place, the liability of defendant was not changed from that of a common carrier to that of a warehouseman. p. 193.
3. CARRIERS.—*Carriage of Freight.—Liability.—Burden of Proof.*—Where plaintiff, seeking recovery for goods lost in transit, has shown delivery of same to a carrier, and that they were not redelivered, he has made a *prima facie* case against the carrier, which places upon the latter the burden to prove its freedom from liability. p. 193.
4. CARRIERS.—*Carriage of Freight.—Liability as Warehouseman.*—Although a warehouseman is not an insurer and his liability is based on negligence merely, defendant carrier could not escape liability for a loss of freight even on the theory that its liability was only that of a warehouseman, where a *prima facie* case was made by showing a delivery to the carrier and no redelivery, and there was no evidence to overcome such *prima facie* case. p. 193.

From Kosciusko Circuit Court; *Francis E. Bowser*, Judge.

Action by George E. Stouffer against The Chicago, Rock Island and Pacific Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

M. L. Bell and *A. B. Enoch*, for appellant.

Frazer & Frazer and *Richard Vanderveer*, for appellee.

IBACH, C. J.—Appellee brought this action against appellant to recover the value of 100 sacks of onions which he alleges were lost while in its possession. There was a trial by the court and a finding and judgment for appellee. A motion for new trial having been overruled, this appeal was perfected.

The two points relied on for reversal question the sufficiency of the proof to sustain the judgment. The evidence, which is uncontradicted, is in substance as follows: On December 9, 1911, W. C. Holman loaded a number of cars with onions at Menokee, Colorado. The particular car in question was shipped to Denver, Colorado, and from there to Chicago over appellant's railroad. The car arrived in Chicago, and was placed on appellant's sidetrack on December 16, 1911. One witness testified to loading the car in question, and that 330 sacks of onions weighing 32,315 pounds were placed therein. The car was shipped to Chicago in the name of Holman. Holman testified to the fact of shipping the onions, and that the car was full when it arrived in Chicago, and when the onions were later sold to appellee. Witness Piawatti testified that he inspected the car sometime between December 16 and December 19, and found it in good condition and full of onions. On December 19, Holman sold the car in suit with a number of other cars loaded with the same merchandise to M. Piawatti and Son and George E. Stouffer, appellee. These several cars were divided between the purchasers, the car in question going to appellee. On December 22, an order was given to appellant to ship the car in suit to appellee at Kimmel, Indiana. The car was transferred by appellant to the Baltimore and Ohio Railroad Company in Chicago, and by that company forwarded to its destination. When the car arrived at Kimmel, witness Fasnaugh testified to unloading the car there

for appellee and to the shortage of 100 sacks of onions weighing 11,945 pounds. The undisputed evidence also shows that during the entire time the car was in Chicago it was in the charge of appellant.

Appellant contends there is no proof in the record of the quantity of onions delivered to appellant when the contract for transportation from Chicago to Kimmel was entered into and no proof that appellee is the owner of the cause of action sued on to the extent that he is entitled to sue in his own name. There is the further contention that while the car was on appellant's tracks in Chicago appellant was acting as a warehouseman and not as a common carrier, and, therefore, under the evidence there could be no recovery. The record will not sustain this last contention.

In the shipment of merchandise the rule in this State seems to be that the liability of the carrier does not cease until such merchandise is

1. unloaded from the car and delivered to the consignee, or placed in a storehouse provided for that purpose, and in case the character of shipment is such that it would be impracticable or impossible to place it in the carrier's storehouse, then the liability of the carrier as such would not end in the absence of contract providing otherwise, until the car containing the merchandise is located at the place of destination where such cars are usually unloaded, or at some other convenient place at the request of the consignee. *Pittsburgh, etc., R. Co. v. Nash* (1878), 43 Ind. 423; *Chicago, etc., R. Co. v. Reyman* (1906), 166 Ind. 278, 76 N. E. 970. In other words, since the undertaking of a common carrier includes the obligation of a safe delivery to the consignee, its responsibility as a carrier continues until it has made an actual delivery or has done that which is equivalent, and until that is done,

the shipper is entitled to the same care and protection as before. 4 R. C. L. 749.

There is evidence to show that the shipment in question was never removed to a storage house, and no evidence to show that the car was ever located on one of appellant's unloading tracks or

2. any other safe and convenient place. Such being the state of the record, we would not be justified in holding that the liability of appellant was ever changed from that of a common carrier to that of a warehouseman. Where a plaintiff as in the case at bar has shown a delivery of goods

3. to a carrier, and that they were not redelivered, he has made out a *prima facie* case against the carrier which would entitle him to damages for his loss, and to escape the payment of damages, the burden is upon the carrier to prove its freedom from liability. The liability of a

4. warehouseman is based on negligence, and a warehouseman is not an insurer of goods, as is a carrier, but only the same degree of proof is necessary to make out a *prima facie* case against a warehouseman, namely, the showing of a delivery of goods to him and a failure to redeliver, and the burden is then on him to explain the loss in a manner not attributable to his negligence. 4 Elliott, Contracts §3102. There was no evidence of any character offered by appellant to show its freedom from liability from the loss of the onions while in its care, and while we have held that there is no evidence to show that the relationship of carrier was changed to that of warehouseman, the evidence produced by appellee is sufficient to charge appellant with negligence upon the theory that the goods were lost while acting as a warehouseman.

As to appellant's second contention, appellee as we

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view the evidence was the only person entitled to sue. Judgment affirmed.

NOTE.—Reported in 111 N. E. 809. As to rule that burden of proof is on bailee to explain loss of goods, see Ann. Cas. 1913 D 947. As to termination of carrier's liability as such as affected by its fault preventing removal of goods, see 8 L. R. A. (N. S.) 235. See also, under (1, 2) 6 Cyc 454, 456; (3) 6 Cyc 518, 519; (4) 6 Cyc 462.

EVANSVILLE ICE AND STORAGE COMPANY v. FIDELITY
AND CASUALTY COMPANY OF NEW YORK.

[No. 8,966. Filed March 8, 1916.]

1. INSURANCE.—*Liability Insurance.—Contracts.—Construction.*—The contracts or policies of surety companies engaged in the business of providing indemnity against loss for a money consideration paid by the insured, are to be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable ground to expect. p. 198.
2. INSURANCE.—*Liability Insurance.—Exception in Policy.—Construction.*—Where the exception in a policy issued by defendant insuring plaintiff against liability for injuries to its employees, when properly construed, exempted the defendant from liability thereon where injury was suffered by any person in connection with the making of additions or repairs to or alterations in any building, structure or plant, plaintiff's claim for money expended for medical aid to an injured employe, and for defending an action brought by such employe, was not within the terms of the policy, in view of the fact that such employe was injured while unloading a coil from a car to be installed in an addition which plaintiff was constructing to its ice plant, though such employe was a general employe not directly engaged either in the construction of the addition or in the installation of the appliances therein. p. 199.

From Superior Court of Vanderburgh County;
F. M. Hostetter, Judge.

Action by the Fidelity and Casualty Company of New York against the Evansville Ice and Storage Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George A. Cunningham and Daniel H. Ortmeier,
for appellant.

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Albert W. Funkhouser and Arthur F. Funkhouser,
for appellee.

FELT, P. J.—This appeal involves the construction of a contract, or policy for liability insurance, issued by appellee to appellant. The question presented is further narrowed by appellant's admission in its brief that "the sole question presented is whether or not the policy covered the injury to appellant's employe." The suit was brought by appellee to recover certain premiums alleged to be due it on certain insurance policies issued to appellant. To the complaint appellant filed a third paragraph of answer, and also a counterclaim in which the facts set out are substantially identical with those of the third paragraph of answer. The substance of the facts averred in the third paragraph of answer and in the counterclaim is that appellant held a policy duly issued to it by appellee by the terms of which it agreed (1) to indemnify appellant "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered through the assured's negligence, and as the result of an accident occurring while the policy is in force (a) by any employe or employees of the assured while within the factory, shop, or yard described in the said schedule, or upon the sidewalk or other ways immediately surrounding the same provided for the use of such employes or the public, in and during the operation of the trade or business described in the said schedule; * * * (2) To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, through the assured's negligence, by the persons described in subsections A and B

of the preceding paragraphs at the place and under the circumstances described, and as the result of an accident occurring while this policy is in force." That the policy contains the following provisions, to wit:

"(C) This policy does not cover loss from liability for, or any suit based on, injuries or death suffered or caused by any persons in connection with the making of additions or repairs to or alterations in any building, structure, or plant; or in connection with the construction, wrecking, or demolition of any building, structure, or plant, or any part thereof; but ordinary repairs when made by employes of the assured whose compensation is included in the estimate set forth in the schedule are permitted."

It is also averred in substance that appellant paid to appellee the full amount of the premium on said policy and has complied with all the conditions thereof on its part; that during the period covered by the policy one Charles Smith was in the employ of appellant as a laborer in and about the ice and cold storage plant referred to in the policy, and was one of the employes contemplated and covered by the terms thereof and on whose account, in part, the premium of said policy was estimated and paid; that on May 15, 1911, appellant had contracted for the construction of an addition to its plant, involving the installation therein of certain appliances and machinery, among which was a certain ammonia coil, consisting of a heavy coil of iron pipe of great weight; that it was delivered to appellant's plant on a flat car; that said Smith was not engaged in the construction of the addition or in the installation of the appliances and machinery therein, but was engaged generally as a day laborer by appellant to do such work as he was required to

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do in and about the plant; that in the usual course of his employment he was directed by appellant's foreman to assist in unloading the coil from the car, and in so doing was assisted by other employes of appellant, all of whom were covered by the terms of said policy; that Smith and other employes undertook to remove the coil and, while they were engaged in so doing, it fell from the car upon him knocking him down and breaking, bruising and otherwise seriously injuring his leg, and rendering him wholly helpless; that it was necessary that he be removed to a hospital and given medical and surgical aid; that appellant at once caused him to be removed to a hospital and directed that he be given necessary medical and surgical attention; that appellant paid for his attendance at the hospital the sum of \$59 and the further sum of \$50 for services of the physician in attendance upon him; that appellant was also required to pay and did pay to Smith his wages for the period of ten weeks at \$10.50 a week, amounting to \$105. That afterwards Smith brought suit in the Vanderburgh Circuit Court against appellant seeking therein to recover on account of said injuries; that in his complaint he alleged that appellant was guilty of negligence resulting in said injury in this, that appellant did not furnish a sufficient number of men to remove said coil; that as soon as the suit was commenced appellant notified appellee thereof and demanded that it defend the action and save appellant from any expense, cost or liability of any kind on account thereof; that appellee refused to defend the action and denied absolutely any liability on account of the accident under the terms of the policy, and by reason of such refusal appellant was compelled to and did employ attorneys to defend the action, and in so doing incurred an expense and liability for attorney's fees in connection therewith in

the sum of \$150, no part of which has ever been paid by appellee. A copy of policy No. 2016675 is filed with the counterclaim as a part thereof.

A demurrer to each of the pleadings was sustained and appellant refusing to plead further it was agreed that there was due appellee for the balance of premiums on the policies sued on, the sum of \$317 and the judgment was rendered in favor of the appellee for that amount. Appellant prayed an appeal which was granted. The errors assigned are the sustaining of the separate demurrers to the third paragraph of answer and to the counterclaim.

It is not claimed that Smith was directly employed in the work of constructing the new addition for which a contract had been made but appellee contends that each of the pleadings shows that the work at which he was engaged when injured was "in connection with" the making of such addition and therefore that liability, if any, for such injury was not covered by the policy by reason of the exception in clause (c) thereof.

The averments fairly construed show that the injured employe was a common laborer in and about appellant's plant; that at the time of his injury he was not engaged in the actual work of constructing the addition to the plant, but in obedience to the orders duly given by appellant's foreman, was engaged in helping other like employes unload a metal coil intended to be used in the addition then under construction. The contracts, or policies,

of surety companies engaged in the business

1. of providing indemnity against loss for a money consideration paid by the insured, "when there is room for construction, is to be construed most strongly against the surety and in favor of the indemnity" which the insured had reasonable ground to expect. *United States Fidelity, etc.,*

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Co. v. Poetker (1913), 180 Ind. 255, 263, 102 N. E. 372. Applying this rule of construction to the

provisions of the policy involved in this suit,
2. it is still apparent that appellee undertook to provide indemnity to appellant for such losses as are designated in the policy which should result from accidents and injuries to employes while engaged in their employment in and about the plant in the usual and ordinary operation thereof, but not when the injury was "caused by any person in connection with the making of additions or repairs to or alterations in any building structure, or plant." The employe, Smith, when injured was rendering a service that was occasioned by and connected with the construction of the addition to appellant's plant, and was not at the time rendering such services as would bring the injury within those contemplated by the parties when the policy was executed. The losses suffered by appellant as alleged in the third paragraph of answer and in the counterclaim were not, therefore, within the indemnity stipulated in the insurance contract between the parties. 4 Cooley, Briefs on Ins. 3315; *People's Ice Co. v. Employer's Liability Assur. Co.* (1894), 161 Mass. 122, 124, 36 N. E. 754; *Woollman v. Fidelity, etc., Co.* (1901), 87 Mo. App. 677; *Phillipsburg Horse, etc., Co. v. Fidelity, etc., Co.* (1894), 160 Pa. St. 350, 28 Atl. 823; *Tolmie v. Fidelity, etc., Co.* (1903), 41 Misc. 451, 84 N. Y. Supp. 1020, 1023; *Hoven v. Employer's Liability Assur. Co.* (1896), 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. The court therefore did not err in sustaining the demurrers to the third paragraph of answer and to the counterclaim. Judgment affirmed.

NOTE.—Reported in 111 N. E. 812. As to estoppel of employers' liability insurance company to deny liability under contract, see Ann. Cas. 1912 D 909. See, also, under (1) 25 Cyc Anno. 224e; (2) 25 Cyc Anno. 224f.

**WAINWRIGHT TRUST COMPANY, ADMINISTRATOR v.
DULIN, RECEIVER.**

[No. 9,396. Filed March 8, 1916.]

1. **APPEAL.—Assignment of Error.—Questions Presented.**—Assignments of error that certain paragraphs of answer did not state facts sufficient to constitute defenses to the action are not recognized by the law and present no question. p. 201.
2. **APPEAL.—Assignment of Error.—Briefs.—Questions Reviewable.**—Where all the propositions of law and authorities cited by appellant in its brief were under headings of error directly challenging the sufficiency of certain paragraphs of answer, and neither the demurrer nor the memorandum accompanying the same, nor either the complaint or answer, were set out on such brief to support the remaining assignment alleging error in overruling the demurrer to appellee's second paragraph of answer, no question was presented. p. 202.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by the Wainwright Trust Company, administrator *de bonis non* of the estate of Nancy A. McDonald, deceased, against John L. Dulin, receiver for the Hamilton Trust Company of Noblesville, Indiana. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Gentry & Campbell, for appellant.

Shirts & Fertig, for appellee.

HOTTEL, J.—On January 13, 1913, The Hamilton Trust Company of Noblesville, Indiana, was appointed administrator of the estate of Nancy A. McDonald, deceased, and qualified and began the administration of the affairs of such estate. On January 22, 1915, the company, while acting as such administrator, was closed by the auditor of State and, on February 22, 1915, appellee was appointed receiver for the company to settle and close up its business. On March 10, 1915, The Hamilton Trust Company, by its receiver, filed its

report and resignation as such administrator, such report showing that it had received cash belonging to the McDonald estate amounting to \$773.53 and had paid out the sum of \$188.44, leaving a balance, in favor of the estate of \$585.09. This report and resignation were approved by the court and appellant was appointed administrator *de bonis non* of the estate and as such demanded from the receiver the sum of \$585.09, and payment was refused, whereupon, according to appellant's statement of the nature of the action, "this action was instituted to recover said \$585.09 and to establish a preferred claim against the assets in the hands of the defendant" (appellee). There was a complaint in two paragraphs and an answer to each paragraph thereof in three paragraphs, the first of which is a general denial. A demurrer was sustained to the third paragraph and overruled as to the second. Appellant refused to plead further and judgment was rendered against it on each paragraph of its complaint and in favor of appellee for costs.

The errors assigned and relied on for reversal are:

- (1) The second paragraph of answer of appellee to appellant's first paragraph of complaint does
 1. not state facts sufficient to constitute a defense.
- (2) The second paragraph of answer of appellee to appellant's second paragraph of complaint does not state facts sufficient to constitute a defense.
- (3) The court erred in overruling the demurrer of the appellant to the second paragraph of the answer of appellee. It is insisted by appellee that no question is presented for our decision by the record or by appellant's briefs herein. Without indicating in detail the several reasons on which appellee bases its contention, it is sufficient to say that neither of the first two errors assigned is recognized by the law and hence presents no question.

All the propositions of law and authorities cited by appellant are cited, either under the heading, "The First Error", or the heading, "The
2 Second Error." Neither the demurrer, nor the memorandum accompanying the same, if any, is set out in appellant's brief. The only reference in the briefs to the demurrer is a statement, twice made, to the effect that the appellant filed a demurrer to the second paragraph of answer on the ground that said paragraph does not state facts sufficient to constitute a defense *to either paragraph of the complaint*. This statement is not borne out by the record. The ground of the demurrer shown by the record is that "neither of said paragraphs state facts sufficient to constitute a cause of defense *to plaintiff's complaint*." Appellant, under the heading, "The First Error", says, that, "the first error relied on for reversal was raised by the overruling of demurrer to second paragraph of answer to first paragraph of complaint and involves the question of a preference between creditors". Appellant follows this statement with abstract propositions of law and fact with citation of authorities, apparently in support of its contention that the trial court improperly denied a "*cestui que trust* of a trust estate a preference over general creditors when a trust company organized under the laws of the State of Indiana and acting as trustee of trust property, converts such trust property to its own use when such trust company becomes insolvent."

Appellee contends that this question is not presented by the pleadings in the case. Appellant's brief does not set out a copy of either paragraph of the complaint or of the answer, but the statement of the complaint therein made, in so far as it purports to set out what the complaint alleges, justifies appellee's statement. However, whether the plead-

ings present the question indicated is rendered immaterial by the infirmities indicated in appellant's brief. *Quality Clothes Shop v. Keeney* (1915), 57 Ind. App. 500, 106 N. E. 541; *Muncie Electric Light Co. v. Joliff* (1915), 59 Ind. App. 349, 109 N. E. 433; *Pittsburgh, etc., R. Co. v. Farmers Trust, etc., Co.* (1915), 183 Ind. 287, 108 N. E. 108; *Pillsbury, etc., Co. v. Walsh* (1915), 60 Ind. App. 76, 110 N. E. 96; *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878; *Combs v. Combs* (1914), 56 Ind. App. 656, 105 N. E. 944; *Holler v. State* (1914), 182 Ind. 268, 106 N. E. 364; *Gifford v. Gifford* (1915), 58 Ind. App. 665, 107 N. E. 308; §§344, 348 Burns 1914, Acts 1911 p. 415; *Helms v. Cook* (1916), 62 Ind. App.—, 111 N. E. 632. These infirmities are such as to prevent a consideration of the merits of the questions attempted to be presented and render unavailable the errors assigned and relied on. The judgment below is, therefore, affirmed.

NOTE.—Reported in 111 N. E. 808. See, under (1) 3 C. J. 1368; 2 Cyc 989; (2) 3 C. J. 1416; 2 Cyc 1017.

PRITCHARD ET AL. v. MINES ET AL.

[No. 8,904. Filed March 9, 1916.]

1. EXCEPTIONS, BILL OF.—*Filing.—Extension of Time.—Appeal.—Record.—Evidence.*—Where the trial court granted ninety days for the filing of a bill of exceptions containing the evidence, and at the subsequent term, without notice to the opposite party or attorneys, entered an order purporting to extend the time for filing, and such bill was filed after the expiration of the original time granted, but within the extended period, such bill was not a part of the record on appeal and the omission precluded a consideration of questions depending on the evidence. p. 206.
2. BONDS.—*Action for Breach.—Verdict.—Answers to Interrogatories.*—In an action on a bond executed in connection with the exchange of real estate and conditioned that defendants should complete

certain improvements on the property traded to plaintiffs, where the breach alleged was defendant's failure to pay for such improvements after their completion, answers by the jury to interrogatories showing that certain persons performed labor and furnished materials in the making of such improvements, that their respective claims were in certain designated amounts, that the grantee of defendants had conveyed to a third person who thereafter conveyed to grantee's wife, and that all the claims were paid by check, but not showing who paid the claims, were not in conflict with a general verdict for plaintiffs. p. 207.

3. **BONDS.—Action.—Parties.—Complaint.**—In an action on a bond, where the complaint disclosed that plaintiffs were joint obligees under it, and also alleged that the payment for which recovery was sought had been made by one only of such obligees, the objection that he alone should have sued should have been presented by demurrer to the complaint for insufficiency of facts. p. 207.
4. **PLEADING.—Complaint.—Waiver of Defects.**—Where a complaint is insufficient, the defect must be presented by demurrer, or by answer if not apparent on the face of the pleading, and is waived if not thus presented. p. 208.
5. **APPEAL.—Questions Presented.—Ruling on Joint Motion.—Separate Assignments of Error.**—Where appellants assigned error separately on the overruling of a motion which the record discloses was joint, such assignments presented no question. p. 208.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by James E. Mines and another against Leona Pritchard and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed*.

Clarke & Clarke and *Means & Buening*, for appellants.

S. C. Kivett and *Bailey and Young*, for appellees.

CALDWELL, J.—Appellees brought this action against appellants to recover for the breach of a bond hereinafter described, of which appellants were obligors and appellees obligees. The following facts among others appear from the complaint: Under date of March 24, 1910, appellants, Carl C. and Leona Pritchard, husband and wife, entered into a contract in writing with appellees James E.

and Anna Mines, husband and wife, by which the former agreed to exchange a certain lot owned by them, situate in the city of Indianapolis, for certain farming lands, owned by the latter, situate in Orange County. By the terms of the contract, the appellants bound themselves to make certain extensive improvements on two dwelling houses situated on the lot, and to convey such real estate to appellees by warranty deed and free of liens. It is alleged that subsequently and in order to induce the consummation of the exchange of real properties before the completion of the improvements on the Indianapolis real estate, the appellants, as principals, and appellant, Walter J. Hubbard, as surety, entered into an undertaking or bond in writing in the penal sum of \$2,000, made payable to appellees, as obligees, and conditioned for the completion of such improvements as agreed. On the execution of the bond, appellees by warranty deed conveyed the Orange County land to appellants, Pritchard and Pritchard, and the appellants executed their warranty deed, conveying the Indianapolis property, appellee James E. Mines, alone being named as grantee by consent of all the parties, including Anna Mines. The breach of the bond alleged is to the effect that Pritchard and Pritchard, in making the improvements, contracted an indebtedness for labor and materials aggregating \$2,108.41, which they failed to pay, whereby notices of liens were filed under the statute, and that to prevent the foreclosure of such liens and the consequent sale of the Indianapolis property, appellee James E. Mines, to protect his title, was compelled to pay and did pay the sum of \$2,108.41, whereby appellees demand judgment in that sum. The cause having been placed at issue by the filing of answers and replies, a trial by jury resulted in a verdict in favor

of appellees and against appellants in the sum of \$1,630, on which judgment was rendered.

Each appellant separately assigns error to the following effect: That the court erred, (1) in overruling the motion for judgment on the

1. answers of the jury to interrogatories; (2) in overruling the motion for a new trial. All

questions discussed under the second assignment, and to which points are directed in appellants' brief, depend on the evidence. Appellees insist that the evidence is not in the record, and that as a consequence, appellants, under the second assignment, have presented no question for our consideration. Appellees are right in such contention. The record is as follows: September 13, 1913, being at the September term of court, judgment having theretofore been rendered on the verdict, the court overruled the respective motions for a new trial, and granted ninety days within which to file all bills of exception. December 3, 1913, at the November term, the trial court, without requiring notice to appellees or their attorneys of an application to that end, as required by statute, entered an order purporting to extend the time within which to file all bills of exception to January 12, 1914. The bill of exceptions containing the evidence was filed January 7, 1914, after the expiration of the time first granted. Under such circumstances, the order purporting to grant a re-extension of time was ineffective, and the bill of exceptions containing the evidence is not a part of the record. It follows that no question is presented under the second assignment. §661 Burns 1914, Acts 1911 p. 193; *English v. English* (1915), 182 Ind. 675, 107 N. E. 547; *Richmond Light, etc., Co. v. Rau* (1915), 184 Ind. 117, 110 N. E. 666.

As to the first assignment, the answers of the jury

to the interrogatories are to the effect that certain named persons performed labor and furnished

2. materials in the making of the improvements on the Indianapolis property, and that their respective claims were in certain designated amounts. There are other answers that the Pritchards conveyed the Indianapolis property to James E. Mines, who subsequently conveyed it to a third person, who thereafter conveyed to appellee, Anna Mines, and that all the claims mentioned in the complaint were paid by check. There is no interrogatory directed to the question of who drew the checks or who in fact paid the claims. It seems to us apparent without elaboration that the answers to the interrogatories are not inconsistent with the general verdict. It is argued under the first assignment that the court erred in overruling the motion under consideration for the reason that appellees, as joint obligees under the bond on which the action is based, united as plaintiffs, while all the claims described in the complaint were paid by appellee James E. Mines, and that he alone, therefore, suffered damage by the breach of the bond. That none of these facts are disclosed by the answers to interrogatories is a sufficient answer to the argument.

The bond here is exhibited with the complaint. It discloses that appellees are joint obligees under it. There is an averment also that James E. Mines paid all the claims mentioned in the complaint. If it be true that under such circumstances James E. Mines should have sued alone as sole plaintiff, and his wife should not have been joined with him, and if the essential facts are revealed by the complaint, the question should have been presented by demurrer to the complaint for insufficiency of facts. 1 Works, Practice (3d ed.) §§354, 485 and cases cited. Neither paragraph

of the complaint was challenged in the trial
4. court on the grounds indicated, and the question of the sufficiency of the complaint or any paragraph thereof is not presented in any manner on this appeal. Where such a defect, if it exists, does not appear on the face of the complaint, it must be presented by answer, and if not presented by demurrer or answer it is waived. Subd. 6 §344 and §348 Burns 1914, Acts 1911 p. 415. Assuming that it may be presented also by an assignment in the motion for a new trial that the evidence is insufficient to sustain the verdict, such an assignment cannot be considered for reasons indicated, that the evidence is not before us. The court did not err in overruling the motion for judgment on the answers to the interrogatories. Moreover, the record leaves it somewhat uncertain as to whether such a

5. motion was in fact filed. It is disclosed, however, that if filed, it was joint as to the three appellants. Each appellant, however, assigns error separately on the overruling of such motion filed by him. Under such circumstances, the assignments present no question. Elliott, App. Proc. §318; *Towell v. Hollweg* (1881), 81 Ind. 154; *Stout v. Duncan* (1882), 87 Ind. 383; *Starkey v. Starkey* (1906), 166 Ind. 140, 144, 76 N. E. 876. We are not required on this appeal to determine the question of whether two joint obligees in a bond may join as plaintiffs in an action for the breach thereof when it is disclosed that only one of them is damaged, but see the following: *Hansel v. Morris* (1824), 1 Blackf. 307; *Moore v. Jackson* (1871), 35 Ind. 360; *Mandlove v. Lewis* (1857), 9 Ind. 194; *Sourse v. Marshall* (1864), 23 Ind. 194; *Miller v. Maher* (1914), 178 Mich. 571, 146 N. W. 196; *Harker v. Burbank* (1903), 68 Neb. 85, 93 N. W. 949; *North St. Louis, etc., Co. v. Essex* (1911), 157 Mo. App.

18, 137 S. W. 295; *St. Louis, etc., R. Co. v. Coultas* (1864), 33 Ill. 189; *Sprague v. Wells* (1891), 47 Minn. 504, 50 N. W. 535; *Farni v. Tesson* (1862), 1 Black 309, 17 L. Ed. 67; *International Hotel Co. v. Flynn* (1909), 238 Ill. 636, 87 N. E. 855, 15 Ann. Cas. 1059, note; 15 Ency. Pl. and Pr. 528; 5 Cyc 820; 9 Cyc 703; 4 R. C. L. 65. There is no error for which the judgment should be reversed.

NOTE.—Reported in 111 N. E. 804. As to the filing of bills of exceptions, see 15 Am. St. 297. See, also, under (1) 4 C. J. 289; 3 Cyc 42; (2) 38 Cyc 1927; (3) 31 Cyc 294, 743; (4) 31 Cyc 720; (5) 3 C. J. 1352; 2 Cyc 1003.

ELLIOT, ADMINISTRATOR v. ELLIOT.

[No. 8,992. Filed March 9, 1916.]

1. **APPEAL.—Review.—Instructions.**—In an action against an administrator to recover a claim against his decedent's estate, an instruction that defendant had a right to prove payment without a formal plea of payment, but that the burden of proof was upon him to prove payment if he relied upon it as a defense, was not objectionable on the ground that no burden rested on defendant until plaintiff had made proof of all material allegations of the complaint, in view of an instruction which fully informed the jury as to the burden resting on plaintiff. p. 212.
2. **TRIAL.—Instructions.—Duty to Request.**—Where a party feels that an instruction by the court lacks certain embellishments or qualifications it is his duty to tender an instruction covering the omissions. p. 212.
3. **APPEAL.—Review.—Refusal of Instructions.**—In an action on a claim against a decedent's estate, there was no error in refusing a requested instruction to the effect that admissions made by decedent prior to his death that he was indebted to plaintiff would not in themselves be sufficient to prove the indebtedness, in view of another instruction which, when considered with instructions given on the subject of verbal negotiations between plaintiff and decedent, fully covered the matters included in the instruction refused. p. 213.
4. **EXECUTORS AND ADMINISTRATORS.—Claims Against Estates.—Witnesses.—Competency of Claimants.**—Under §523 Burns 1914, §500 R. S. 1881, a plaintiff in an action against a decedent's estate is a competent witness on his own behalf concerning matters

- testified to by witnesses for the estate as to conversations with the claimant and not had in the presence of the decedent. p. 214.
5. **APPEAL.—Evidence.—Weight and Sufficiency.**—The court will not weigh the evidence on appeal and will deem it sufficient to uphold the verdict if it supplies reasonable ground for inferring the facts essential to a recovery. p. 214.
6. **EXECUTORS AND ADMINISTRATORS.—Action on Claim Against Estate.—Evidence.—Sufficiency.**—In an action on a claim against a decedent's estate, based upon an alleged agreement by decedent to pay interest to plaintiff on an agreed valuation on land conveyed by the plaintiff, where the deeds of conveyance executed by plaintiff were silent as to the agreement contended for by him, evidence consisting of such deeds, a memorandum by decedent referring to a settlement between himself and plaintiff showing a balance of \$48 interest due plaintiff in 1892, together with the testimony of two witnesses that decedent had admitted that he owed plaintiff interest and that plaintiff was to receive 6 per cent on the valuation of each 20-acre tract conveyed, precluded the court on appeal from disturbing the verdict for plaintiff, although there was evidence showing the plaintiff had depended on decedent for years and that no payment of interest had been made during a period of fifteen years, and notwithstanding that plaintiff's introduction of the deeds in evidence placed upon him the burden of showing the true consideration. pp. 215, 216.
7. **EVIDENCE.—Admissions.—Parol Evidence.**—Verbal admissions should be received as evidence with caution. p. 216.

From Wells Circuit Court; *Wm. H. Eichhorn*, Judge.

Action by Samuel Elliot against the estate of Patrick H. Elliot, deceased, and from a judgment for plaintiff, Jack Elliot, as administrator of such estate appeals. *Affirmed.*

C. A. Henry, Gus S. Condo, John R. Browne and Edwin C. Vaughn, for appellant.

Robert T. St. John, William H. Charles, Willard B. Gemmill, Abram Simmons, and David P. Long, for appellee.

MORAN, J.—Appellee recovered a judgment in the court below against the estate of his son in the sum of \$855.68. From this judgment an appeal has been prosecuted by appellant, assigning as error the

overruling of his motion for a new trial. The causes for a new trial, as presented by appellant's brief for review, are: That the verdict is not sustained by sufficient evidence and is contrary to law; the admission of incompetent evidence; the giving of instruction No. 2 on the court's own motion, and the refusal to give instruction No. 7 as requested by appellant.

Briefly the theory of appellant's right to recover as against his son's estate, and which was embodied in proper pleadings is that subsequent to the year 1884, and prior to the year of 1891, appellee sold a portion of his real estate to his three sons. This he did on account of ill health, being unable to cultivate the same, and being desirous of procuring an income therefrom during the remainder of his natural life.

The agreement made with his sons was that as to twenty acres to be conveyed to each of his sons respectively, there was to be an income of 6 per cent on a named consideration of \$800 to be paid by the sons each year during the remainder of the life of appellee. Appellant's decedent, Patrick H. Elliot, became the owner many years before his death of the three tracts of real estate burdened with the covenants to pay the gross sum of \$144 per year; that many years elapsed without any payment having been made, so that at the date of the death of Patrick H. Elliot there was due appellee including principal and interest the sum of \$3,160, and the further sum of \$75, being the purchase price of a horse.

Appellant earnestly insists that the evidence does not support the verdict. This is the principal reason urged for reversal of the judgment. The other objections to the action of the trial court, viz., the admission of incompetent evidence and the giving and refusing to give instructions partially embrace the

ground covered by the alleged error as to the evidence being insufficient to support the verdict, and as a matter of convenience will be disposed of first. Instruction No. 2 as given by the

1. court of its own motion informed the jury that appellant had a right to prove payment of any sum or sums alleged in the complaint to be due, without a formal plea of payment; but the burden of proof was upon appellant to prove payment if he relied upon the same as a defence. The objection urged to this instruction is that there was no burden of any kind on appellant in a cause of the character being tried until after appellee had established his cause of action by proof of all material allegations of his complaint; and that while as an abstract proposition of law the instruction might be free from criticism, yet under the circumstances without further explanation or qualification, that its tendency was to mislead the jury. Instruction No. 1 given by the court on its own motion told the jury that the burden was upon appellee to establish by a preponderance of the evidence all the material allegations of his complaint before he was entitled to recover. That it was incumbent on appellee to prove by a preponderance of the evidence that the debt sought to be recovered or some part of the same was due and owing. There is evidence in the

2. record which makes the instruction on payment proper, and, if there is any infirmity by the lack of it being further embellished or qualified, it was appellant's duty to have tendered an instruction covering the qualifications which he desired.

Chicago, etc., R. Co. v. Hamerick (1912), 50

1. Ind. App. 425, 96 N. E. 649. When this instruction is read in connection with instruction No. 1 given by the court of its own motion,

the substance of which is the foregoing, the instruction could not have misled the jury.

Instruction No. 7 tendered by appellant is to the effect that admissions made by the decedent prior to his death that he was indebted to appellee

3. would not in themselves be sufficient to prove the indebtedness or agreement; that an indebtedness actually existed must be established by *prima facie* evidence, and if the jury should find that the only evidence offered supporting the alleged contract were the admissions of decedent its verdict should be for appellant. Instruction No. 6 given at the request of appellant informed the jury, among other things, that as to admissions testified to as having been made by the decedent as to his owing appellee, even if made, would not entitle appellee to recover, unless he establish by a preponderance of the evidence that some amount was due at the time of the decedent's death. This instruction fully covers the matters included in instruction No. 7 as refused, when read in connection with instructions Nos. 1, 2 and 3 given at the request of appellant, which, in substance, informed the jury that all verbal negotiations between appellee and Patrick H. Elliot in relation to the conveyance of the real estate merged and became a part of the deed, which was the best evidence, and which could not be altered by parol evidence, except the consideration might be explained; but even parol evidence could not be resorted to for this purpose unless the consideration for the deed as explained actually entered into or antedated the execution and delivery of the deed; that a subsequent arrangement to the execution of the deed, whereby Patrick H. Elliot was to pay so much per year to his father, unless a part of the original consideration for the execution of the deed, would not be binding on appellant; that the con-

sideration must have been agreed upon at the time or before the execution of the deed, and if the evidence failed to so establish this fact the jury would not be warranted in finding that the payment of interest on the named consideration of \$800 for the execution of the deed entered into the consideration of the same; and, further, if appellee failed to prove by a preponderance of the evidence when the alleged agreement to pay interest was made, or that there was no evidence as to when the same was made, the presumption was that the true consideration was stated in the deed. The value of admissions as evidence so far as they relate to the question under consideration in this cause, and how far parol testimony might be resorted to to explain the consideration named in this deed were specifically covered when the instructions, the substance of which is the foregoing, are read as an entirety, and were quite as favorable to appellant as the law would warrant. No error was committed by the trial court in refusing to give instruction No. 7 as tendered by appellant.

Under the statute, the claimant was a competent witness on his own behalf to testify concerning matters testified to by witnesses for the

4. estate as to conversations with the claimant and not had in the presence of the decedent.

This was the extent of appellee's testimony, hence there was no error committed by the trial court in this respect. §523 Burns 1914, §500 R. S. 1881; *Atkinson v. Maris* (1907), 40 Ind. App. 718, 81 N. E. 745.

Is the verdict supported by the evidence? A presentation of this question must be approached keeping in view the principle of our practice

5. that, on appeal, the appellate tribunal will not weigh the evidence, and will not disturb

the verdict if there is any evidence to support each material fact on which the verdict rests; and in this connection, it is sufficient to uphold the verdict if the evidence supplies such reasonable grounds for inferring facts essential to a recovery. *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869.

The deeds of conveyance executed by appel-

6. lee to his sons are silent as to the agreement contended for by him, and the establishment of which by proper proof is essential to support the verdict. It is argued by appellant that the introduction of the deeds in evidence by appellees made out a *prima facie* case against himself as to what constituted the true consideration for their execution. And to sustain his claim that the consideration was other than named in the deed, it became necessary for him to overthrow the recitals in the deed as to the consideration and establish a new consideration as averred, and that a different consideration from that named in the deed had been agreed upon before or at the time of the execution of the deed, and was the consideration upon which the deeds rested. *Hayes v. Peck* (1886), 107 Ind. 389, 8 N. E. 270; *Levering v. Shockey* (1885), 100 Ind. 558; *Lowry v. Downe* (1898), 150 Ind. 364, 50 N. E. 79.

A sister of the decedent testified that she heard her brother, Pat, say on July 7, 1899, in the presence of Mr. Weeks and Mr. Devore that, "We were to pay 6 per cent on \$800"; that the twenty he got of Will and the east forty were to pay 6 per cent on \$800 as to each twenty. Mr. Weeks testified that in July, 1899, the deceased told him that he owed his father some interest, as his father was to receive 6 per cent interest on \$800 for each twenty-acre tract as long as he lived, and that the decedent owned the three twenties at that time. Outside the deeds of conveyance there is no further written evidence that

throws light on the transaction other than a memorandum taken from a book kept by the decedent during his lifetime, which refers to a settlement between himself and his father, and reads as follows: "All the above accounts were included in the settlement of Samuel and P. H. E., dated February 28, 1892, which settlement shows as a result that P. H. E. had paid Samuel all due on all accounts. And \$48 as interest on \$800, which was to be applied to the year of 1892, and this settlement made the accounts balance except interest of \$48 per year on \$800. P. H. Elliot."

The caution with which admissions verbally made should be received as a class of evidence is fully recognized by courts and the writers of

7. text-books on evidence. 1 Elliott, Evidence §242; *Pence v. Makepeace* (1879), 65 Ind. 345; *Chandler v. Schoonover* (1860), 14 Ind. 324. Appellant's argument, when closely analyzed, is not that there is in reality no evidence to

6. support the contract as to the payment of the consideration contended for by appellee, but that on account of the weakness of the evidence and the safeguards thrown around estates of the dead by the courts, where the payment of claims such as under consideration are sought to be enforced, the verdict should not be allowed to stand, especially in view of the fact that the evidence discloses that appellee informed two of his grandchildren, long before the death of their father, that their father had paid him all he owed and more too, that he had been depending on him for years, that he had been good to him and their grandmother; and that the only denial made to this by the claimant was that he did not remember making such statements to his grandchildren. It is further pressed in this connection that Patrick H. Elliot lived in close

proximity to his father for twenty years; that scarcely a day had passed that he did not visit his father and mother, and that his father was not in such circumstances that he could well afford to have treated the income of \$144 per year so lightly as to let it run during a course of fifteen years. As to this latter contention, the record discloses that Patrick H. Elliot and his father were on the best of terms, and that there was no want of filial duty and respect on the part of the son to his father and mother. The fact, however, that the claim was permitted to run during the course of many years without disclosing any circumstances why the payment had not been pressed is an argument, no doubt, that was not overlooked in presenting the cause to the jury, as the weighing of these circumstances was exclusively within its province. Recurring to the former contention that the verdict should not stand on account of its not being sufficiently supported as to the establishment of the contract, there should be considered in this connection that at the time of the making of the purported memorandum by Patrick H. Elliot, disclosing a settlement between himself and his father, he was the owner then of but one tract of the real estate; and the memorandum is subject to the inference that the settlement was not final, and that the payment of \$48 per year as mentioned therein was a continuing one.

The execution of the deeds being uncontroverted, and taking into consideration the relation of the parties and all the surrounding circumstances, together with the verbal admissions testified to on the part of the decedent and the written memorandum, as aforesaid, we can not say that there was no evidence establishing the contract. The nature and character of the cause is such that when it came before the able trial court on the motion for a

new trial, where it had the right to weigh the evidence, which is not within our province, a new trial, no doubt, would have been granted if a correct result had not been reached. Since this cause was appealed and before the date of submission, the appellee, Samuel Elliot, died and one Henry Munea was appointed administrator of appellee's estate, and as such administrator was properly substituted as the appellee in this court on October 1, 1914. Judgment affirmed.

NOTE.—Reported in 111 N. E. 813. As to admissibility of declarations of deceased persons, see, 94 Am. St. 673. As to competency of a coparty of decedent's representative to testify as to transaction with decedent, see 17 Ann. Cas. 216. See, also, under (1) 38 Cyc 1748, 1778; (2) 38 Cyc 1693; (3) 38 Cyc 1711; (4) 40 Cyc 2330; (5) 4 C. J. 850; 3 Cyc 348.

CONDER v. GRIFFITH.

[No. 8,981. Filed March 10, 1916.]

1. NEGLIGENCE.—*Driving Automobile.—Violation of Statute.—Instructions.*—Where the complaint charged negligence in the driving of an automobile east on the left side of the street and at the rate of twenty miles an hour in violation of the State law, so as to strike and injure plaintiff as he stepped from in front of a standing street car which was facing east, an instruction, based on §10468 Burns 1908, Acts 1907 p. 558, advising the jury that the law provides that any person operating a motor vehicle upon meeting a person riding, leading or driving a horse, etc., upon any public highway, shall not operate it at a speed exceeding six miles an hour, and that a violation of the statute constituted negligence for which defendant was liable, if plaintiff was free from contributory negligence, was erroneous, since the provisions of the statute referred to had no application to the case. p. 221.
2. NEGLIGENCE.—*Driving Automobile.—Violation of Ordinance.—Evidence.—Instructions.—Jury Question.*—Under a charge of negligence in driving an automobile east on the left side of the street in violation of a city ordinance making it unlawful for vehicles to be driven over and along the left side of any street and requiring riders and drivers to "keep as nearly as practicable to the right side of the street", thereby causing such automobile to strike plaintiff as he stepped to the left side of the street from in front of a standing

street car which was facing east, an instruction that the violation of such ordinance was negligence for which plaintiff could recover in the absence of contributory negligence, was erroneous in view of evidence showing that the street car was not at a regular stopping place and that the portion of the street to the right was blocked by a lumber wagon, since under such circumstances it was for the jury to determine whether it was practicable for defendant to pass on the right, and if not practicable his driving to the left was not actionable negligence. p. 222.

3. WORDS AND PHRASES.—“*Vehicle*”.—The word “vehicle” as used in statutes or ordinances regulating traffic, means any carriage or conveyance used or capable of being used as a means of transportation on land, but ordinarily does not include locomotives, cars and street cars operated over a permanent track in the absence of an intention to that effect clearly expressed. p. 223.
4. TRIAL.—*Instructions*.—*Requisites*.—Instructions should not only state correct principles of law but they should also be applicable to the issues and facts. p. 223.
5. NEGLIGENCE.—*Violation of Statute or Ordinance*.—*Negligence Per Se*.—*Exceptions*.—As a general rule the violation of a statute or ordinance which is the proximate cause of an injury is negligence *per se*, but there may be facts and circumstances which will excuse a technical violation and render it improper for the court to declare as a matter of law that such violation constitutes actionable negligence. p. 223.
6. STATUTES.—*Ordinances*.—*Traffic Regulations*.—*Construction*.—Statutes and ordinances regulating traffic in public streets or highways should receive a reasonable construction consistent with the purpose of their enactment and the practical difficulties that arise in their application to particular cases. p. 224.

From Superior Court of Marion County (91,108);
Pliny W. Bartholomew, Judge.

Action by Howard Griffith against Croel P. Conder. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Earl R. Conder, for appellant.

M. L. Clawson, for appellee.

FELT, P. J.—This is an appeal from a judgment obtained by appellee against appellant for personal injuries, alleged to have been caused by appellant's negligence in driving his automobile into and against appellee while he was crossing a street in the city of

Indianapolis. The errors assigned and relied on for reversal are, the overruling of appellant's motions for judgment on the answers to interrogatories and for a new trial.

The complaint was in two paragraphs on which issues were joined by general denial. The facts disclosed by the complaint are as follows: On May 1, 1912, appellee was employed by the Indianapolis Traction and Terminal Company, as a motorman. The company owned and operated a double-track car line running east and west on East 10th Street, in the city of Indianapolis. The south track was used by east bound cars and the north track by west bound cars. On the day in question appellee was operating an east bound car and stopped it opposite a fire-engine house located on the north side of the street. When the car stopped he alighted and started to cross in front of the street car on his way to the engine house when appellant approached from the west and collided with him. The negligence charged in each paragraph of complaint is that appellant negligently and carelessly drove his automobile on the north side of said street and negligently and carelessly, and in violation of the State law, drove the automobile east on the left side of the street and at the rate of twenty miles an hour, and without knowledge or warning, ran against, upon and over appellee thereby inflicting the injuries of which he complains. The first paragraph also charges that such conduct was in violation of a certain ordinance of the city of Indianapolis, then in full force and effect, which provides that it shall be unlawful for all riders and drivers of vehicles whether such vehicles are drawn or propelled by animal or other power, to ride or drive on, over and along the middle, or on, over and along the left side of any street in the city of Indianapolis, except in the necessary act of cross-

ing the same, or of passing a vehicle going in the same direction; that all such riders and drivers shall keep as nearly as practicable to the right of such street, but the provisions of this section shall not apply to street railways. That any such person using any of the streets of the city of Indianapolis when met by any other vehicles, shall keep to the right, and when overtaken by any vehicle shall likewise keep to the right, allowing such rider or driver to pass him to the left, so as to permit such vehicles to pass free and uninterrupted.

Under the assignment that the court erred in overruling appellant's motion for a new trial, appellant contends that the court erred in giving to

1. the jury instruction No. 11 which is as follows: "It is provided by the law of our State as follows: That any person or persons operating a motor vehicle, shall, upon meeting any person or persons riding, leading, or driving a horse, horses, or other draft animals, or other farm animals on any public highway, not operate it at a speed to exceed six miles an hour. A violation of this law is negligence, and if you find from a fair preponderance of the evidence in this case that the defendant violated this law and that the plaintiff did not contribute to his injury in any degree by his want of ordinary care and prudence, and such want of care and negligence was the proximate cause of plaintiff's injury then your finding should be for the plaintiff." The act of 1907 (Acts 1907 p. 558, §10468 Burns 1908), in force when the alleged injury was received, provides as follows: "That any person or persons operating a motor vehicle shall, upon meeting any person or persons riding, leading or driving a horse, horses or other draft animals or other farm animals on any public highway, proceed at a speed not to exceed six miles per hour until past such horses, or other draft animals or other

farm animals, and upon request or signal by putting up the hand from any such person or persons so riding, leading or driving any horse, horses or other draft animals or other farm animals (if in sufficient light for such signal to be perceptible) immediately bring his motor vehicle to a stop and remain stationary so long as may be reasonable to allow such horse, horses or other draft animals or other farm animals to pass." Another section of the statute then in force limited the speed of automobiles to eight miles an hour in the business and closely built up part of the city and to fifteen miles per hour in other portions of the city. The complaint charges that appellant was operating his automobile in violation of the State law, and that the court by instruction No. 11 told the jury that he was negligent if he violated the foregoing statute which limits speed to six miles per hour under the conditions specified; that if such negligence was the proximate cause of appellant's injury he could recover, if he was not himself guilty of contributory negligence. The provisions of the statute referred to in the instruction have no application to the case made by the complaint or the evidence and it was therefore error to give the instruction. *Baltimore, etc., R. Co. v. Peck* (1913), 53 Ind. App. 281, 285, 100 N. E. 674; *Indiana R. Co. v. Maurer* (1903), 160 Ind. 25, 31, 25 N. E. 156; *Indianapolis Traction, etc., Co. v. Mathews* (1912), 177 Ind. 88, 107, 97 N. E. 320.

Instruction No. 12 given by the trial court relates to certain provisions of the city ordinance mentioned in the complaint, to the effect that it

2. shall be unlawful for vehicles drawn by animal or other power to ride or drive on, over and along the middle or on, over and along the left side of any street, etc., "except in the necessary act of crossing the same or passing a vehicle going in the

same direction; and all such riders and drivers shall keep as nearly as practicable to the right side of the street, but the provision of this section shall not apply to street railways." A vehicle is any carriage or conveyance used or capable of being used

3. as a means of transportation on land. The word "vehicle" will not ordinarily include locomotives, cars and street cars which run and are operated only over and upon a permanent track, or fixed way, and it will not be held to include them unless the context of the ordinance or statute clearly indicates an intention to do so. 8 Words and Phrases 7284; Century Dict. "Vehicle"; *Whitaker v. Eighth Ave. R. Co.* (1873), 51 N. Y. 295, 298; *Heib v. Town of Big Flats* (1901), 66 App. Div. 88, 73 N. Y. Supp. 86, 87; *Baltimore, etc., R. Co. v. District of Columbia* (1897), 10 App. Cas. (U. S.) 111, 120; *Duckwall v. City of New Albany* (1865), 25 Ind. 283, 286; *Mercer v. Corbin* (1889), 117 Ind. 450, 454, 20 N. E. 132, 10 Am. St. 76, 3 L. R. A. 221.

The court told the jury that a violation of this

2. ordinance by appellant was negligence and, if such negligence was the proximate cause of appellee's injury, he could recover unless he was guilty of negligence contributing to his injury. The undisputed evidence shows that when the street car stopped at the engine house, which was not a regular stop for taking on and discharging passengers, the passageway on the right or south side of the street was blocked by a lumber wagon at the time opposite the street car. Instructions should not only state

correct principles of law but they should be

4. applicable to the issues and facts of the particular case in which they are given. Instruction No. 12 states correctly an abstract proposition of law, for the general rule is that the
5. violation of a statute or ordinance which is the

proximate cause of an injury is negligence *per se*. *Hamilton, Harris & Co. v. Larrimer* (1915), 183 Ind. 429, 105 N. E. 43; *Cincinnati, etc., R. Co. v. Butler* (1885), 103 Ind. 31, 37, 2 N. E. 138; *Cincinnati, etc., R. Co. v. Hiltzhauer* (1885), 99 Ind. 486, 487; *Louisville, etc., R. Co. v. Davis* (1893), 7 Ind. App. 222, 232, 33 N. E. 451. While the general rule is as above stated, and the violation of such statute or ordinance is *prima facie* negligence *per se*, nevertheless there may be facts and circumstances which will excuse a technical violation of an ordinance or statute and render it improper for the court to declare as a matter of law that such violation constitutes actionable negligence. It may be said that facts which will excuse such technical violation must result from causes or things beyond the control of the person charged with the violation. In such instances there may or may not be actionable negligence and it is a question of fact, to be determined by the court or jury trying the case, from all the facts and circumstances shown by the evidence, (1) whether there was a sufficient and reasonable excuse for such violation, and (2) whether in doing, or omitting the act complained of, the defendant was in fact guilty of actionable negligence. We do not find any direct authority for so stating the foregoing exception to the general rule that the violation of a statute, or ordinance resulting in an injury, is negligence *per se*, but reasoning by analogy, and on principle, such exception should be recognized, is reasonable, and tends to promote justice and the practical enforcement of the spirit and purpose of the statutes and ordinances to which reference is made. Such ordinances and statutes as the one now under consideration should receive a reasonable construction consistent with the purpose of their

6.

enactment and the practical difficulties that arise in their application to particular cases.

In the case at bar, the undisputed fact of the obstruction on the south side of the street opposite the street car should have been taken into

2. account and the question should have been submitted to the jury to determine as a question of fact, (1) whether under the circumstances appellant had a reasonable excuse for driving on the left side of the car contrary to the provisions of the ordinance, and if so, whether in so doing he exercised reasonable and ordinary care for the safety of others upon the street. In *Indianapolis St. R. Co. v. Slifer* (1905), 35 Ind. App. 700, 74 N. E. 19, this court considered a case involving the ordinance now under consideration and after setting out its provisions said: "The court instructed the jury that if it found such ordinance to have been in force, and that at the time of the accident appellee was traveling upon the left side of the street in violation thereof, then he would be guilty of such contributory negligence as would bar his recovery for damages received while thus violating such ordinance and received in consequence of such violation, unless it should also find that the right side of the street was in such condition as to render it impracticable or unsafe to travel thereon, in which case he would not be chargeable with negligence solely because he was traveling on the left side of the street. The ordinance required drivers of vehicles 'to keep as nearly as practicable to the right side of such street.' If appellee did this, there was no violation either of the letter or the spirit of the ordinance. The ordinance itself contemplated conditions under which its observance would not be practicable. Whether he did it or not was, under the evidence, a question of

fact." As bearing somewhat on the question by analogy, see, also, *Young v. Citizens St. R. Co.* (1897), 148 Ind. 54, 63, 44 N. E. 927, 47 N. E. 142; *Marsh v. Boyden* (1912), 33 R. I. 519, 524, 82 Atl. 393, 40 L. R. A. (N. S.) 582; *Siddall v. Jansen* (1897), 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112, 114; 29 Cyc 436; 1 Thompson, Negligence §§1289, 1290, 1306, 1307.

We have examined the answers to the interrogatories and do not think the court erred in overruling the motion for judgment thereon. In any event, on the record presented, we think the ends of justice will be subserved by ordering a new trial of the case. The judgment is therefore reversed with instructions to sustain appellant's motion for a new trial. Ibach, C. J., Caldwell, Moran, Hottel and Shea, JJ., concur.

NOTE.—Reported in 111 N. E. 816. As to temporary street obstructions and encroachments, see 107 Am. St. 248. As to statutory duty and liability of person operating automobile in street, see 1 L. R. A. (N. S.) 223; 4 L. R. A. (N. S.) 1130. As to effect of violation of statute or ordinance regulating speed limit of automobiles in street, as negligence, see 25 L. R. A. (N. S.) 40. As to violation of statute or ordinance not intended for plaintiff's benefit as actionable negligence, see 9 Ann. Cas. 427; Ann. Cas. 1912 D 1106. As to rights and duties of persons driving automobiles in highways, see 13 Ann. Cas. 463; 21 Ann. Cas. 648. See, also, under (1) 28 Cyc 646; (2) 29 Cyc 645; (3) 39 Cyc 1125; (4) 38 Cyc 1612; (5) 29 Cyc 436, 439; (6) 36 Cyc 1110.

MURPHY v. STATE OF INDIANA.

[No. 9,432. Filed March 10, 1916.]

APPEAL.—*Findings of Juvenile Court.*—*Form.*—*Sufficiency.*—The statute (§1635 Burns 1914, Acts 1907 p. 221) permits a less formal and technical procedure in the taking of appeals from the juvenile court than is customary in other proceedings; hence special findings from that court, though prefaced by the statement that "the evidence of the State showed the following facts", followed by findings of fact, including the fact that defendant had invited a

boy under the age of sixteen years into his saloon, gave him beer and permitted him to remain therein, were not objectionable as not being findings of facts but merely a statement of what was shown by the evidence on one side and, although the use of the words "evidence of the State" is to be condemned, the findings were sufficient to sustain the conclusion that defendant was guilty of contributing to the delinquency of a boy under the age of sixteen years, in view of the presumption indulged on appeal that the trial court performed its duty to consider all the evidence before it.

From Juvenile Court of Marion County (10,292a);
Frank J. Lahr, Judge.

Prosecution by the State of Indiana against Martin J. Murphy. From a judgment of conviction, the defendant appeals. *Affirmed.*

Holmes & McCallister, for appellant.

Evan B. Stotsenburg, Attorney-General, *Alvah J. Rucker*, *Horace M. Kean*, *Leslie R. Naftzger*, *Omer S. Jackson* and *Wilbur T. Gruber*, for the State.

IBACH, C. J.—This is an appeal from a judgment rendered against appellant for contributing to the delinquency of a boy under sixteen years of age. Appellant requested the judge to certify the facts of the case to this court in the form of a special finding of facts, and to state his conclusions of law thereon, for the purposes of appeal, under §1635 Burns 1914, Acts 1907 p. 221. The court prefaced its finding as follows: "The defendant in the above entitled cause having prayed an appeal from the judgment rendered against him in the juvenile court of Marion county, to the Appellate Court of Indiana, and having requested that the judge of said juvenile court make a special finding of facts in said cause, and certify the same, as is provided by law, the judge of said juvenile court does now make the following finding of facts in said cause, to wit: The evidence of the state showed the following facts: (1) That the defendant, Martin J. Murphy, was on or about July 27, 1915, the owner of a saloon

at No. 533 West Maryland Street, in the city of Indianapolis, Marion County, Indiana. * * *

(3) That during the evening of said day, while said defendant was in charge and control of said saloon, he, said defendant, requested and encouraged one Gordon Roe, a boy under the age of sixteen years, to enter and remain in said saloon." There are fifteen other findings of fact, upon which the court stated as a conclusion of law that the defendant was guilty of the offense of contributing to the delinquency of a boy under the age of sixteen years. The findings above set out are given merely to show generally the manner in which the court's findings were stated.

The assignment of error is the only one permitted under §1635 Burns 1914, *supra*, relative to appeals from the juvenile court, namely, that the decision of the court is contrary to law. Appellant's contentions are, "What purports to be the special finding of facts made up and certified by the judge of the juvenile court, is a mere recitation of the evidence introduced by the State," and, "There is no finding as to what the facts really were, but only a statement as to what was shown by the evidence on one side of the case. This is not sufficient." We are not disposed to agree with appellant's contention that the findings of the judge state evidence only, and not facts. The statute permits a less formal and technical procedure in the taking of appeals from the juvenile court, than is customary in other proceedings. The judge states that he "does now make the following finding of facts," to wit, "the evidence of the State showed the following facts." No objection could be made to the finding if this latter clause were omitted. But what effect is to be given it? It is merely equivalent to the judge's saying that the "evidence showed certain conditions, which I find to be facts, that is, to be actually existent."

If, for example, the judge had said that the evidence showed that Murphy gave Roe a glass of beer, this would have been merely the finding of evidence. *American Bonding Co. v. State, ex rel.* (1907), 40 Ind. App. 559, 82 N. E. 548. But when the judge said that the evidence showed the *fact* that Murphy gave Roe a glass of beer, this meant that it was established as a fact, as actually true.

The form of the special finding is not to be commended. The sentence "the evidence of the State showed the following facts," is wholly unnecessary. The use of the words "evidence of the State" is to be condemned. Findings of fact must be made from a consideration of all of the evidence in the case. The use of these words has caused appellant to argue that the judge considered only the evidence produced by the State. However, the evidence in this case has not been brought before us, and we have a right to presume that the court in the performance of its duty considered all the evidence before it, and that either the defense introduced no proof, or that if evidence was introduced by the defense it was not of such a character as to contradict the evidence of the State. In view of the record, we are not disposed to hold that the finding is so defective in form as to work a reversal of the judgment.

Although no question is raised as to the sufficiency of the facts found, beyond the objection as to the form of the finding, it appears that appellant invited a boy under sixteen years of age into his saloon, and gave him a glass of beer to drink, and permitted him to remain in the saloon for thirty minutes and to drink other glasses of beer bought for him by an adult companion. Section 1648 Burns 1914, Acts 1907 p. 266, enumerates among acts which constitute the offense of encouraging delinquency of a

child the permitting of a boy under sixteen years of age to enter and remain in a saloon where intoxicating liquor is sold.

It appears, therefore, that the facts found by the court were such as would support the judgment of conviction. Judgment affirmed.

NOTE.—Reported in 111 N. E. 806. As to sales of liquor to minor, see 12 Am. St. 354. As to validity, construction and effect of statutes regulating admission of minors to saloons, see 22 L. R. A. (N. S.) 1007. See, also, 4 C. J. 776; 3 Cyc 310; 38 Cyc 1980.

TOWN OF NEW CARLISLE v. TULLAR.

[No. 8,800. Filed January 5, 1916. Rehearing denied March 10, 1916.]

1. APPEAL.—*Transcript.—Certificate of Clerk.—Sufficiency.*—The certificate of the clerk to a transcript on appeal is sufficient if it substantially complies with §667 Burns 1914, Acts 1903 p. 338. p. 232.
2. APPEAL.—*Briefs.—Sufficiency.*—Briefs showing a good faith effort and substantial compliance with Rule 22 will be considered to the extent that the questions presented may be ascertained therefrom. p. 232.
3. MUNICIPAL CORPORATIONS.—*Contracts with Officers.—Secretary of Board of Health.*—A contract between a board of town trustees and the secretary of the town's board of health, employing the latter to care for smallpox patients during an emergency, was not within the letter of §2423 Burns 1914, Acts 1905 p. 584, §517, making it a criminal offense for a public officer to enter into contracts wherein the State, county, township, town or city, in which he exercises official jurisdiction is concerned. p. 234.
4. MUNICIPAL CORPORATIONS.—*Health Board.—Status of Secretary of Board.—Contract with Municipality.—Validity.*—Under §7605 Burns 1908, Acts 1891 p. 15, providing that "the trustees of each town * * * and the board of commissioners of each county shall constitute a board of health *ex officio*, for each town and county, respectively" and authorizing the selection of a secretary who shall be the executive officer of the board and receive such salary as the board electing him may determine, such secretary was the one upon whom responsibility rested in determining when the necessity for action arose and the character and extent of means employed in preventing the spread of contagious diseases and caring for indigent patients, and such officer of a town board of health

was an officer of the municipality for the purpose of discharging the duties devolving upon him, with power to incur indebtedness against the municipality in certain contingencies; hence a contract between a board of town trustees and the secretary of its board of health, whereby he was specially employed to care for smallpox patients was void as against public policy, and, even if entered into prior to his appointment as secretary of the board of health, it could not, for reasons of public policy, be enforced as to services rendered while he was such health officer. pp. 234, 236.

5. OFFICERS.—*Contracts.—Validity.—Public Policy.*—A contract entered into by a public officer, the execution of which may make it possible for his personal interests to become antagonistic to his faithful discharge of public duty, is void as being against public policy. p. 236.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Arthur G. Tullar against the Town of New Carlisle. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Hubbell, McInerny, McInerny & Yeagley, for appellant.

Anderson, Parker, Crabhill & Crumpacker, for appellee.

FELT, J.—Suit by appellee against appellant to recover for certain professional services rendered and for medicines furnished in treating certain persons afflicted with smallpox in the town of New Carlisle, in pursuance of an alleged contract with appellant. Issues were formed on a complaint in one paragraph and an answer in five paragraphs. From a judgment in favor of appellee for \$362.22, appellant has appealed. The errors assigned and relied on for reversal are (1) the overruling of appellant's demurrer to the complaint; (2) overruling appellant's motion for judgment on the answers of the jury to the interrogatories; (3) overruling the motion for a new trial.

Appellee contends that no question is presented for decision because of the insufficiency of the clerk's

certificate to the transcript and also that the

1. briefs are insufficient to present certain questions mentioned by appellant. The certificate is somewhat meager but is in substantial compliance with the statute. §667
- 2.

Burns 1914, Acts 1903 p. 338. By a liberal construction, the briefs may be held to show a good faith effort, and a substantial compliance with the rules of the court, though the provisions of clause 5, Rule 22, have not been fully complied with. To the extent the questions may be ascertained from the briefs, they will be considered.

The complaint in substance shows that in February, 1907, the trustees of the town of New Carlisle, constituted *ex officio* the board of health of said town; that on said day certain occupants of a hotel in said town were stricken with small-pox, a dangerous and communicable disease; that on that day the town board of health employed appellee, who was a duly licensed and practicing physician of St. Joseph County, Indiana, to take charge of said afflicted persons and render them such medical services as were necessary; that in pursuance of such employment, appellee rendered the necessary services and furnished medicine, all of the value of \$523.70, an itemized account of which was filed with the complaint showing the services rendered from March 1 to March 28, 1907, inclusive; that appellee presented an itemized account of his bill to appellant and demanded payment which was refused. The complaint was answered by a general denial; a plea of payment; a plea of compromise, settlement and tender of \$50; also by an amended fourth paragraph in which it was averred in substance that, on February 28, 1907, appellant appointed appellee as its health officer at a salary of \$15 per year; that he then accepted the appoint-

ment, entered upon a discharge of his duties and agreed to serve at the salary of \$15 per year; that at the time he rendered the services for which he seeks to recover he was such health officer and thereafter accepted payment from appellant in full for such services in accordance with his contract of employment. The fifth paragraph is substantially the same as the fourth but goes more into detail and shows that appellee's appointment was duly made by the town board when in session and was duly recorded in the record of the proceedings of February 28, 1907. To the affirmative answers, replies in general denial were filed.

In answer to interrogatories, the jury found the facts substantially as alleged in the fourth and fifth paragraphs of the answer. The answers also show that appellee knew when he accepted the appointment as health officer that he, as such officer, was to care for and doctor persons in said town afflicted with contagious diseases; that appellant agreed to pay appellee for services rendered in doctoring smallpox patients of said town during the month of March, 1907, more than the \$15 paid its health officer, but made no record of such employment, which was made by one of its members, a Mr. Davis.

Appellee contends that he was first employed as a physician to treat the smallpox patients and that later in the same day he was appointed to and accepted the position of health officer of the town. Appellant contends that there was no employment of appellee by the board to treat the patients and that at most there was only some talk by the individual members of the town board on the street when the board was not in session. It is not, however, denied that appellee held the position of health officer during the month of March when all the services for which he seeks to recover

were performed. Numerous propositions are discussed in the briefs but our conclusion as to the effect of appellee's holding the position of secretary of the board of health during the time the services were rendered, for which he seeks to recover, makes it unnecessary to consider the other questions.

It is claimed by appellant that appellee was an officer of the town of New Carlisle and that conceding that he was employed by the town board

3. as a physician to treat smallpox patients at the expense of the municipality, such contract is invalid for two reasons, viz., (1) it is in violation
4. of §2423 Burns 1914, Acts 1905 p. 584, §517, and, therefore, void; (2) such contract is void

because, independent of the statute, it is against public policy. We do not think the alleged contract comes within the letter of the statute, but the contention that it is against public policy presents a more serious question. The act of 1891, §7605 Burns 1908, Acts 1891 p. 15, in force in 1907, provides that: "The trustees of each town * * * and the board of commissioners of each county shall constitute a board of health, *ex officio* for each town and county, respectively, of the State, whose duty it shall be to protect the public health, by the removal of causes of diseases, when known, and in all cases to take prompt action to arrest the spread of contagious diseases * * *. They shall annually * * * elect a secretary, who shall be the executive officer of the board. * * * He shall receive such compensation from the town * * * as the board electing him may determine."

By the provision of the statute, the secretary is made the executive officer of the board of health and by his professional skill he is the one upon whom the responsibility rests in determining when the necessity for action arises and the character and extent

of the means to be employed in preventing the spread of contagious diseases and in caring for and treating indigent patients. He not only acts for the board, but for the municipality, and in certain emergencies has the power to incur indebtedness against such municipality in the absence of express authority of the board of health. He has been held to be an officer of the municipality for the purpose of discharging the duties which devolve upon him in his official capacity. *City of Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 161, 39 Am. Rep. 127; *City of Greenfield v. Black* (1908), 42 Ind. App. 645, 647, 82 N. E. 797; *Town of Knightstown v. Homer* (1905), 36 Ind. App. 139, 142, 148, 75 N. E. 13. It is apparent that the secretary of a board of health in his official capacity owes high and important duties to the public. His responsibility not only involves the health and sanitary conditions of the citizens generally but in determining when it is necessary to act and the nature and extent of the measures to be employed he necessarily determines questions which reach and affect the public treasury. When measures have been taken and treatment given at the expense of the public, he is charged with general supervision and must likewise determine when such measures or treatment may safely be discontinued. What was said of a member of the board of health in *City of Fort Wayne v. Rosenthal*, *supra*, 160, is applicable here. "The antagonism between the appellee's private interest and his public duty, it is manifest, was very great, and calculated to cast suspicion upon his discharge of duty, no matter how faithfully and conscientiously it was done. Let it be understood that such personal advantage may result to a member of a board, and suspicion not only attaches to his selection of those who may be served at public expense, but it extends

to and taints the original decision and declaration of the board, that an emergency existed which required the work to be done." Further on, in the same opinion in deciding whether the question was controlled by the statute, the court said: "But if this were not so, and the case were to be determined by the general principles of law, the result would be the same. Section 52 is only a reenactment of the well established rule, that an agent, in reference to the subject of the agency, must not put himself in a position which is adverse to that of his principal. As agent he can not contract with himself personally. He can not buy what he is employed to sell. If employed to procure a service to be done, he can not hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason."

Whenever a public officer enters into a contract, the execution of which may make it possible for his personal interests to become antagonistic to

5. his faithful discharge of public duty, such contract is held void on the ground that it is

4. against public policy. In considering this question in a case where a duly appointed superintendent of the construction of a free gravel road sought to recover for labor performed for the contractor, our Supreme Court said: "There is a class of contracts, entered into by officers and agents of the public, which naturally tends to induce the officer, or agent, to become remiss in his duty to the public, that the courts unhesitatingly pronounces illegal and void as being contrary to public policy.

* * * 'It is a well established and salutary doctrine', says a distinguished author, 'that he who is

entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man can not serve two masters, and is recognized and enforced wherever a well regulated system of jurisprudence prevails'. 1 Dillon, Mun. Corp. (4th ed.) §444. The principle is stated in 1 Clark & Skyles, Agency §39 (e) as follows: 'Any contract of agency by a public officer by which he binds himself to violate his duty to the public, or which places him in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duty, is clearly illegal and void'. Greenwood, Public Policy 337, states the doctrine thus: 'Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void'. See, also, page 337 quoted approvingly in *Brown v. First Nat. Bank* (1894), 137 Ind. 655, 667 [37 N. E. 158], 24 L. R. A. 206. * * * Influence is a subtle agent. It is often potential when its presence is unsuspected." *Cheney v. Unroe* (1906), 166 Ind. 550, 553, 77 N. E. 1041, 117 Am. St. 391. In *Waymire v. Powell* (1886), 105 Ind. 328, 332, 4 N. E. 886, our Supreme Court by Mitchell, J., said: "Where public officers are authorized by law to employ others to perform services for the municipality of which they are officers, public policy forbids that they should employ one of their own number. It is of no consequence that no injury, or that an actual benefit, has resulted from such employment. The law will not permit

public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employments, whether made directly or indirectly, utterly void. *People v. Township Board* [1863], 11 Mich. 222; *Kinyon v. Duchene* [1870], 21 Mich. 498."

The services for which a recovery was allowed in this case continued throughout the month of March. Appellee's duties as health officer were continuous throughout that time. The determination of the necessity for the continuation of the services at the expense of the municipality during that time was a question that devolved upon him in his official capacity, whether he acted honestly and in good faith is not material to the question under consideration. The question depends not upon what was actually done under the contract but upon what was made possible thereby. Recovery for such continued services can not be sustained on the ground of emergency. Cases dealing with emergency have been duly considered but are not of controlling weight here, though they have application to many situations which arise in relation to public health. The principle of public policy is involved and we, therefore, hold that the alleged contract under which the services were rendered is void if entered into after appellee accepted the position of health officer and that, if entered into before he became such health officer and the services were rendered while he was such officer, the contract was thereby rendered invalid and its enforcement would be against public policy. Whether the contract was entered into shortly before, at the time, or after appellee's appointment as secretary of the board of health, is not material, for it is not disputed that he rendered the services while acting in his official capacity as health officer. As supporting our conclusion we

cite the following authorities which sustain the principle involved and illustrate its application. *Miller v. Jackson Tp.* (1912), 178 Ind. 503, 513, 99 N. E. 102; *Noble v. Davison* (1912), 177 Ind. 19, 28, 96 N. E. 325; *City of Greenfield v. Black* (1908), 42 Ind. App. 645, 82 N. E. 797; *Alexander v. Johnson* (1896), 144 Ind. 82, 84, 41 N. E. 811; *United States v. Trans-Missouri, etc., Assn.* (1897), 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, 1027; *Williams v. Segur* (1886), 106 Ind. 368, 1 N. E. 707; *Wingate v. Harrison School Tp.* (1877), 59 Ind. 520, 524; *State, ex rel. v. Windle* (1901), 156 Ind. 648, 651, 59 N. E. 276; *Atlee v. Fink* (1881), 75 Mo. 100, 42 Am. Rep. 385; *Snipes v. City of Winston* (1900), 126 N. C. 374, 35 S. E. 610, 78 Am. St. 666; 2 McQuillin, Mun. Corp. §513; 9 Cyc 481, *et seq*; *Greenhood*, Public Policy 337; *City of Frankfort v. Irvin* (1904), 34 Ind. App. 280, 283, 72 N. E. 652, 107 Am. St. 179; *Monroe v. City of Bluffton* (1903), 31 Ind. App. 269, 67 N. E. 711.

The judgment is reversed with instructions to the lower court to sustain appellant's motion for judgment in its favor on the answers of the jury to the interrogatories.

NOTE.—Reported in 110 N. E. 1001. As to liability of municipality under executed contract in which municipal officer is interested, see Ann. Cas. 1912 D. 1132. See, also, under (1) 4 C. J. 450; 3 Cyc 108; (2) 3 C. J. 1407; 2 Cyc 1013; (3) 28 Cyc 480; (4) 28 Cyc 650; (5) 9 Cyc 485; 29 Cyc 1435.

PUBLIC SAVINGS INSURANCE COMPANY v. MANNING, ADMINISTRATOR.

[No. 8,935. Filed March 15, 1916.]

1. INSURANCE.—*Life Insurance.—Action on Industrial Policy.—Premiums Paid by Agent of Insurer.—Evidence.—Sufficiency.*—Where an industrial policy provided that benefits should be paid if the insured died while premiums were not in arrears exceeding

four weeks, and that no agent could alter or change the contract, evidence showing an agreement for temporary payment of premiums by the agent of insurer on behalf of plaintiff, that subsequently the insurer's superintendent called at plaintiff's home and informed him that the policy was still in force and advised him to pay the premiums, that pursuant to such advice plaintiff saw the agent and told him he could resume payment, that such agent called the following Monday and collected one weekly premium on the policy and entered the payment on a book furnished by insurer to plaintiff for that purpose, together with testimony of the agent from which it appeared that he had personally paid plaintiff's premiums in an amount sufficient to extend the policy beyond the date of the death of plaintiff's child, on whose life it was issued, was sufficient to support a verdict for plaintiff as against the theory that the policy had lapsed. pp. 241, 245.

2. **INSURANCE.—Life Insurance.—Industrial Policy.—Forfeiture.—Premiums.—Payment by Agent of Insurer.—Effect.**—Where the agent of insurer, on being advised by plaintiff that he was unable to pay the weekly premiums on an industrial policy on the life of his child agreed temporarily to pay the premiums for plaintiff, such agreement merely created an agency as between plaintiff and such agent and was not binding on the insurer; but to the extent that such agent in fact paid premiums, they must be deemed paid. p. 244.
3. **INSURANCE.—Life Insurance.—Waiver of Provisions in Policy.—Acts of Agent.**—Although an industrial policy on plaintiff's child provided against waiver of any of its provisions except by indorsement signed by the president, vice president, secretary or medical director of the company, a verdict for plaintiff was not precluded even if the evidence were held to show a failure to keep the premiums paid as required by the policy, in view of evidence showing that after the time when the policy was alleged to have expired, defendant's superintendent of agents called at plaintiff's home to discuss the policy and assured plaintiff that the policy had not lapsed and that it was only necessary for plaintiff to resume payment of the premiums, that thereafter plaintiff paid a premium and was given credit therefor in a book provided by defendant for such purpose, and that plaintiff, though at the time entitled to have the policy reinstated, was not advised by such superintendent or by the agent to whom he subsequently paid the premium that such course was necessary, since under the evidence the acts of such superintendent and agent must be deemed a waiver of the provision against forfeiture. pp. 246, 248, 249.
4. **INSURANCE.—Restrictive Provisions.—Enforcement.**—Restrictive provisions in a contract of insurance are not literally enforced by the courts regardless of the attending circumstances. p. 247.
5. **INSURANCE.—Provisions in Policy.—Waiver.**—Restrictive provisions in a policy of insurance, being for the benefit of the company, may be waived by it; and, since oral contracts of insurance

are as valid as if in writing, such provisions may be waived verbally. p. 249.

6. **INSURANCE.**—*Provisions in Policy.*—*Waiver.*—Since a corporation can act only by agent, it follows that a provision in a policy of insurance limiting the power of agents, or providing how the contract may be modified, may be waived by an agent expressly authorized to that end, or by an agent whose authority may be implied from the nature of the agency, a course of dealing or the nature of the business transacted. p. 249.

7. **INSURANCE.**—*Life Insurance.*—*Industrial Plan.*—*Forfeitures.*—In view of the nature of industrial insurance and the class of people with whom the company deals in issuing such policies and collecting the premiums thereon, courts are justified in seizing hold of and giving effect to slight circumstances in order to prevent a forfeiture, where the forfeiture, if enforced, must be based upon some provision inserted in the contract for the benefit of the insurer. p. 253.

From Rush Circuit Court; *John D. Megee*, Judge.

Action by William E. Manning, administrator of the estate of Maxie W. Manning, deceased, against the Public Savings Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Eugene C. Miller, Benjamin F. Miller, Watson, Titsworth & Green and Korbly & New, for appellant.

Will M. Sparks and A. L. Gary, for appellee.

CALDWELL, J.—This appeal is from a judgment in the sum of \$291.34, recovered by appellee on an industrial insurance policy issued on the life of his daughter. To discuss in detail the large number of questions presented is not required. The merits of the case may be determined with substantial accuracy from a consideration of the sufficiency of the evidence to sustain the verdict. The facts are as follows: May 22, 1911, appellant issued an

1. industrial policy on the life of each of appellee's children. Only one of such policies is

involved here. It was issued on the life of Maxie W. Manning, aged twelve years. By its terms appellant obligated itself in effect to pay as benefits on the decease of the insured the sum of \$280, in consideration that there should be paid on each Monday the sum of ten cents premium for the week then commencing, and subject to the conditions of the policy as printed thereon. These conditions were to the following effect; that the policy should be void if payments were not made as specified; that premiums were payable at the home office of the company, but might be made to any authorized representative; if the insured should die while premiums were in arrears not exceeding four weeks, benefits would be paid; if the policy should lapse for the nonpayment of premiums, it might be renewed within one year from the date to which premiums had been paid, on payment of all arrears, provided evidence of the insurability of the insured satisfactory to the company should be furnished. The seventh condition is as follows:

“No condition, provision or privilege of this policy can be waived or modified in any case except by an endorsement hereon signed by the president, the vice president, the secretary or medical director. No agent has power in behalf of the company to make or modify this contract of insurance, to extend the time for paying the premium, to waive any forfeiture, or to bind the company by making any promise not contained herein.”

James Kratzer was appellant's agent for Rush County, and was located at Rushville. As such agent, he was authorized to solicit insurance, industrial and ordinary, and to collect and remit premiums. He solicited the insurance involved here, and collected the premiums. It is alleged in an answer

[Public Savings Ins. Co. v. Manning—61 Ind. App. 239.]

that Samuel R. Sadler was a superintendent of the company, and that he was "an authorized representative of the company". He testified as a witness that he was a superintendent and that his duties were "to superintend the work in a general way", and that the Rushville agency was under his superintendency.

Appellee made the weekly payments on all the policies up to and including the payment of December 11, for the week ending December 18, 1911. He then notified Kratzer that by reason of failing health and lack of employment, he would be unable to continue. Kratzer, however, at his own suggestion, agreed to continue the payments for appellee temporarily. Kratzer testified that under such arrangement he made the payments weekly from December 18, up to and including the payment of April 29, for the week ending May 6, 1912, at which time appellant claims the policy lapsed. Later Sadler called at the Manning home, the date being in controversy. He testified that the visit was made May 30 or 31. Other witnesses fixed the date as June 8. Sadler testified that he informed Mrs. Manning that the policy involved here was within the four weeks period of grace, and that a payment the following Saturday would keep it in force. A witness who was present testified that Sadler said on the subject of whether the policy had lapsed: "You are not out at all; you are in, and go ahead and pay and you are all right." Mrs. Manning testified that Sadler said "you are not out of it; I am the superintendent, and I know"; that it would be all right if they paid; that he did not specify when they should pay or the amount; that he simply said for them to see him Saturday night, or that they could see Kratzer the next week. Appellee testified that he met Kratzer on the street Tuesday of the next

week, being June 11, and informed him that he had employment and that he could resume his payments; that Kratzer called on him the next Monday morning, June 17, and collected forty cents, ten cents on each policy, and entered the payments on a book which appellant had delivered to appellee for that purpose; that Kratzer said at the time that he had paid \$10.40 for appellee, being twenty-six weekly payments on each policy. This statement was not contradicted by Kratzer as a witness. He testified that it was in the latter part of May that appellee notified him he would soon be able to resume the payments, and that on May 28, a day or two later, he reported all the policies to the superintendent as lapsed; that a few days before June 17, appellee asked him to call Monday, and he would commence paying; that he did call as requested on Monday, June 17, and Manning paid him forty cents, being ten cents on each policy, which he credited in Manning's book; that while nothing was said on the subject of renewing the policies or the necessity therefor, he did not send this money to the company as a weekly payment, but subsequently on his own motion, and after the death of the insured, he applied it in renewal of the other three policies. The insured was taken sick suddenly the evening of June 17, and died the next morning. A day or two later Kratzer informed Manning that the policy had lapsed. Later, at Kratzer's suggestion, Manning signed revival applications on the other policies, the necessary payment being made by Kratzer, who on his own motion, applied the forty-cent payment to that end.

The arrangement by which Kratzer agreed temporarily to pay the premiums on the policies was not binding on appellant. That was a mere

2. private agreement between appellee and Kratzer, whereby the latter became noth-

ing more than appellee's agent. To the extent that Kratzer did in fact pay the premiums, they must be deemed paid. To the extent that he failed to pay, the default was appellee's through Kratzer as his agent. *Bennett v. Sovereign Camp, etc.* (1914), 168 S. W. (Tex. Civ. App.) 1023. If Kratzer

1. made no payments on the policy after April 29, six payments amounting to sixty cents were in arrears at the decease of the insured on the policy involved here, or \$2.40 on the four policies. This sum appellee tendered before commencing this action, being the full amount that appellant claimed was in arrears. If Kratzer paid \$10.40 on the policies, as appellee testified he stated in the transaction of June 17, no payments were in arrears at the decease of the insured. Several days after the death of the insured, there was a meeting at which were present appellee, his attorney, Kratzer and Sadler, and at which the status of the policy was discussed. Kratzer, as a witness, testified that at this meeting he stated that he had paid for appellee and forwarded to the company \$10.40 on all the Manning policies. He further testified, however, in explanation of such statement that he paid but \$8.00 or \$8.40 in discharge of premiums on the four policies issued May 22, 1911, and that the balance including the forty cents paid by appellee June 17, was applied on revival expenses. His explanation is, however, not clear, and is somewhat self-contradictory. As we have indicated, Kratzer, in paying premiums for appellee, did so as his agent. In the transaction of June 17, however, he was acting in the capacity of agent for appellant. In that capacity and within the scope of his authority, he called to collect premiums. No other business was transacted. The subject of the conversation then had was the status of the policies rather

than the state of his account with appellee. Appellee was seeking information, not with a view to a settlement with Kratzer personally, but with a view to the payment then to be made on the policies. Appellee's testimony that Kratzer then said that he had paid \$10.40 for twenty-six weeks was properly heard, and should be considered as substantive evidence. *Snyder v. Frank* (1913), 53 Ind. App. 301, 309, 101 N. E. 684, and cases; *Anvil Mining Co. v. Humble* (1894), 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Scott v. Home Ins. Co.* (1881), 53 Wis. 238, 10 N. W. 387. In such view of the case, there is evidence to sustain the verdict, that is, there is some evidence that payments were not in arrears at the decease of the insured. The answers to certain interrogatories returned with the general verdict indicate that the jury took that view of the case.

But if such statement should be considered, not as an admission respecting the actual status of the policies, but merely as an inaccurate declaration of a nature likely to affect the conduct of appellee, then the case presents another view. From such viewpoint it may be assumed that no payments were in fact made after April 29. As we have said, it is alleged in appellant's answer relating to Sadler's visit to appellee's home, that he was "an authorized representative of the company". Thus, respecting the matter in hand, he was apparently clothed with power to act. He had full knowledge that no payments had been made on the policies since April 29. Under such circumstances, he stated in substance that the policies had not lapsed, and urged that they be kept in force, and to that end directed appellee to Kratzer, and thus clothed the latter with apparent authority to deal with the situation. After giving such directions, and on the same day, Sadler discussed the

Manning policies with Kratzer. There was evidence that appellee within the time specified by the superintendent saw Kratzer and notified him that he was ready to resume the payments. The next Monday, June 17, Kratzer called on appellee to collect premiums on the policies. If payments were in arrears at that time, appellee by the terms of the policies had a right to take steps to revive them. Kratzer had full knowledge from appellant's standpoint that no payments had been made since April 29, and that he himself had reported the four policies as lapsed. By virtue of the arrangement between him and Kratzer, appellee did not know the real situation. Under such circumstances, Kratzer was silent respecting the real status of the policies, and stated affirmatively in effect that they were in force. He also treated the policies as in force by collecting premiums and crediting them as such. By his silence, and also by his affirmative statement, he caused appellee to take exactly the step he would have taken had the policies in fact been in force. Under such circumstances, if this cause involved the personal interests of Sadler and Kratzer, we do not doubt that they should be held to have waived the forfeiture of the policy involved here, and to be estopped from asserting that it had lapsed prior to the decease of the insured. Our problem here is to determine whether such waiver and estoppel should be extended to appellant by reason of the conduct of Kratzer and Sadler. Such problem involves a consideration of the restrictive provisions of the policy. These provisions are (1) that no condition of the policy can be waived, except by endorsement thereon, signed by designated officers; (2) that no agent has power to waive a forfeiture.

4. Restrictive provisions in a contract of insurance are not literally enforced by the courts

regardless of the attending circumstances. For illustrative cases, see the following: *Supreme Court of Honor v. Sullivan* (1901), 26 Ind. App. 60, 59 N. E. 37; *Supreme Tent, etc. v. Volkert* (1900), 25 Ind. App. 627, 57 N. E. 203; *Bixler v. Modern Woodmen, etc.* (1911), 112 Va. 678, 72 S. E. 704, 38 L. R. A. (N. S.) 571; *Richardson v. Brotherhood, etc.* (1912), 70 Wash. 76, 126 Pac. 82, 41 L. R. A. (N. S.) 320. The case last cited is analagous to the

case at bar, both in its facts and also by reason of the existence in each case of a provision of the contract which literally applied would prevent a recovery. There the insured was suspended for default in the payment of an assessment. An application for reinstatement made through the local body was rejected by the supreme body, and report to that effect returned to the local body. The latter however led the insured to believe that he had been reinstated, accepted dues paid by him, and remitted them to the supreme body. The latter refused to accept the dues as such, but placed them to the general credit of the local body, and notified it accordingly. Subsequently the insured was injured. In a suit to recover therefor, it was held the supreme body was estopped to deny a right to recover, the basis of the decision being that the supreme body was chargeable with the acts and conduct of the local body as agent, although the by-laws provided that the latter was agent for the insured, rather than for the insurer. In the course of the opinion the following language is used: "This court has consistently and steadfastly adhered to the view that it will not permit an insurance company, whether it be an old line company or a fraternal organization, to change the fundamental law of agency by contract, and thus exonerate itself from liability for the acts of those who are in fact

and law its agents." It is well settled that such provisions of a contract of insurance being made

5. for the benefit of the company, may be waived by it. *Majestic Life Assur. Co. v. Tuttle* (1915), 58 Ind. App. 98, 107 N. E. 22; *Farmers Mut. Fire Ins. Co. v. Jackman* (1905), 35 Ind. App. 1, 73 N. E. 730; *Sovereign Camp, etc. v. Latham* (1915), 59 Ind. App. 290, 107 N. E. 749; *Home Fire Ins. Co. v. Wilson* (1915), 176 S. W. (Ark.) 688. Oral contracts of insurance containing the essential elements are as valid as if in writing. *Ohio Farmers Ins. Co. v. Bell* (1912), 51 Ind. App. 377, 99 N. E. 812. It follows that though the contract be in writing, provisions thereof subject to waiver may be waived verbally.

A corporation can act only through some
6. agency. The waiver as accomplished in any particular instance will be manifested by the act of such agency. As indicated, a provision specifying the manner in which the contract of insurance may be modified or limiting the power of agents, may be waived by the corporation. It follows that such corporation through and by the act of an agency may waive such limiting provision, if such agency be expressly authorized to that end, or if such authority may be implied from the nature of the agency, a course of dealing or the nature of the business transacted. See *Sovereign Camp, etc. v. Latham supra*, and cases; *Gish v. Insurance Co.* (1905), 13 L. R. A. (N. S.) 826, note.

The following language is used in *Southern States Fire Ins. Co. v. Vann* (1915), 69 Fla. 549, 68 South. 647: "The clause in the fire insurance

3. policy placing a limitation on the power of any officer, agent or other representative of the company in the waiver of any provision or condition in the policy does not supersede the law

making the principal liable for the negligent, wrongful or fraudulent act of its agent, or the law of equitable estoppel, and this clause of limitation may itself be waived by the company through its agent acting within the apparent scope of his authority.

* * * An insurance company can not make its local agent the medium through which all the benefits of a policy flow from the insured to it, and then deny that he has authority to represent it when the benefits of the insured are involved". See, also, *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Humbold Fire Ins. Co. v. Ashby* (1915), 57 Ind. App. 682, 108 N. E. 150; *Farmers Mut. Fire Ins. Co. v. Jackman, supra*; *Germania Fire Ins. Co. v. Barringer* (1914), 43 Okl. 279, 142 Pac. 1026; *Western Nat. Ins. Co. v. Marsh* (1912), 34 Okl. 414, 125 Pac. 1094; *Pacific Mut. Life Ins. Co. v. McDowell* (1914), 42 Okl. 300, 141 Pac. 273.

Sadler's apparently broad powers are indicated by the comprehensive term "superintendent". It is conclusively admitted by the pleadings that he called at appellee's home as "an authorized representative of the company". His mission was to adjust the situation involving the policy here. He testified without contradiction or explanation, as we have said, that his duties were to superintend the business in a general way. The Rushville agency was within his jurisdiction. With full knowledge that the policy was subject to forfeiture, and that it had been reported as lapsed, he opened up negotiations whereby it might be kept in force. There was evidence, not without contradiction respecting details, that he referred appellee to Kratzer to that end. He thereby accredited Kratzer. Kratzer thereupon collected a premium and in so doing led appellee to believe that the policy was in force.

After the decease of the insured, this premium was remitted to the company and is yet retained by it. True, the premium, after the decease of the insured, was, through the agency of Kratzer, applied to other purposes, but there was no evidence that appellee either knew of or consented to such application. There was evidence also that appellant prior to the commencement of this action had knowledge that such premium was paid as a premium. By these facts, appellant, in our judgment is estopped to deny liability on the policy. See *Majestic Life Assur. Co. v. Tuttle*, *supra*; *Mutual Indemnity Co. v. Thompson* (1907), 83 Ark. 575, 104 S. W. 200, 119 Am. St. 149, 10 L. R. A. (N. S.) 1064, note. Moreover, what Kratzer said and did was more comprehensive in form than as indicating a mere waiver of the forfeiture. Under the uncontradicted evidence, his language was such as to lead appellee to believe that a liability to forfeiture had not been incurred. The effect of his statement was that he had made payments to date for appellee. As we have said, Kratzer sustained a dual relation to appellee. Within a certain field, he was appellee's agent; within another field he was appellant's agent. If he failed to make the payments, he failed as appellee's agent. In view of the business being transacted, if he misrepresented the facts as to payments made, he did so as appellant's agent. Appellee knew the facts only as he gathered them from Kratzer. If appellee be chargeable with knowledge of the provisions of the policy limiting Kratzer's powers, he did not know Kratzer was exceeding such powers as so limited. Kratzer by merely misrepresenting the facts to appellee did not violate the limiting conditions of the policy. True, however, his *ex parte* action was likely to lead to such result. His conduct in that respect should

therefore be measured by the ordinary rules of agency. Certain language used in *Jones v. Prudential Ins. Co.* (1913), 155 S. W. (Mo.) 1106, is worthy of consideration here. In that case, James, appellee's soliciting agent, procured to be issued to Lang an industrial policy. It contained a provision that it should be void if assigned. James knew when it was issued that it was to be assigned to Jones. Lang, by a writing on the policy, assigned it to Jones "subject to the approval of the Prudential Insurance Company". James verbally sanctioned the assignment, and regularly collected the premiums thereafter, and delivered them to the company which accepted them in ignorance of the assignment, except as James had knowledge thereof. In a suit brought on the policy by Jones after Lang's death, the court in holding that a waiver by the company should be predicated on James' knowledge and conduct, uses the following language: "Moreover, in answer to the suggestion, that it is not competent, as a rule, for a mere soliciting agent to either waive such a condition of the policy or estop the company thereabout, the nature and character of the business and the authorized duties of such agents are to be considered. As before stated, the business of industrial insurance is conducted principally among people of the poorer classes, many of whom are illiterate and but slightly informed concerning intricate business matters. * * * These agents call upon the patrons of the company weekly, make collections, and enter credit therefor in the book of the insured, and seem to have general supervision pertaining to such matters within the immediate debit. To the people with whom they deal, such agents are justly regarded as representatives of the company, with complete power touching the performance of the duties which they daily

exercise in their presence". In view of the nature of industrial insurance and the class of people with whom the company deals in issuing such

7. policies and collecting the premiums thereon, courts are justified in seizing hold of and giving effect to slight circumstances in order to prevent a forfeiture, where the forfeiture if enforced must be based upon some provision of the contract inserted for the benefit of the insurance company. *Farmers Mut. Fire. Ins. Co. v. Jackman, supra*, 17, and cases.

The evidence, although to some extent contradictory, is sufficient to sustain the verdict. Without specifically considering other questions presented, it is sufficient to say that the case was tried without material error. Judgment affirmed.

NOTE.—Reported in 111 N. E. 945. As to effect of limitations on an agent's authority to waive conditions in an insurance policy, see 2 Ann. Cas. 112; 9 Ann. Cas. 380. As to waiver of provision in a life insurance policy premium after appointed time, or similar act, see 7 Ann. Cas. 385. See, also, under (1) 25 Cyc 870, 871; (3, 5) 25 Cyc 861; (4) 25 Cyc 739; (6) 25 Cyc 860; (7) 25 Cyc 740.

HEAD ET AL. v. LEAK, ADMINISTRATOR, ET AL.

[No. 9,362. Filed March 16, 1916.]

1. DESCENT AND DISTRIBUTION.—*Adoption.—Capacity to Inherit.*—The act of adoption does not take away any existing rights, or destroy the legal capacity to inherit from natural parents. p. 255.
2. DESCENT AND DISTRIBUTION.—*Adoption.—Heir in Dual Capacity.*—Where an adopted child of an intestate has a right to property of the decedent either in the capacity of an adopted child or as natural heir, but not in both, it should receive the greatest amount it would be entitled to receive in either capacity. p. 255.
3. DESCENT AND DISTRIBUTION.—*Adoption.—Heir in Dual Capacity.*—Where decedent left surviving him his widow, four sons and an adopted daughter who was the only child of a deceased son, such adopted daughter should take as natural heir, and not as an adopted child, since under the circumstances her rights are greater

as a natural heir, in view of the limitation upon the descent of property taken by an adopted child, contained in §870 Burns 1914, Acts 1883 p. 61. p. 255.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action on the filing of exceptions by William E. Head, and others to the final settlement report of James T. Leak, administrator of the estate of William T. Head, deceased. From the judgment rendered, William E. Head and others appeal. *Reversed.*

Charles F. Remy and *James M. Barryhill*, for appellants.

George M. Piersol, *Harley D. Billings*, *E. C. Stansbury* and *Zimri E. Dougan*, for appellees.

IBACH, C. J.—This is an action which arose on the filing of exceptions by appellants to the final settlement report of appellee, James T. Leak, as administrator of the estate of William T. Head, deceased. The facts as to the situation and relationship of the parties are set forth more fully in the opinion in the case of *Billings v. Head* (1916), 184 Ind. 361, 111 N. E. 177, which involved real property left by William T. Head. William T. Head left surviving him four natural children and an adopted child, who was his grandchild, the only child of a deceased son. In the distribution of the surplus of the personal estate of William T. Head, after the payment of debts, and the satisfaction of his widow's rights, the question arose as to whether Lehallah Head, the adopted child, and one of the appellees, was entitled to one-fifth or to two-sixths of that remainder, that is, whether she took only one share, or whether she took a share as an adopted child, and another share as her father's heir. In the case of *Billings v. Head*, *supra*, it was decided that Lehallah Head was

entitled to only one share. The question is here presented, which was not there decided, as to whether she takes the one share as adopted child, or as natural heir. The act of adoption does not take away

1. any existing rights, or destroy the legal capacity to inherit from natural parents. *Patterson v. Browning* (1896), 146 Ind. 160, 163, 44

2. N. E. 993; *Humphries v. Davis* (1885), 100 Ind. 274, 283, 50 Am. Rep. 788. So, where as

in this case the adopted child has a right to take property in either capacity as adopted child, or as natural heir, but not in both, she should receive the greatest amount she would be entitled to receive in either capacity.

There is in this State a limitation upon the descent of property which is taken by an adopted child. It is provided by §870 Burns 1914, Acts 1883 p. 61, that when an adopted child dies intestate,

3. without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from the adopting parent, such property so coming to the adopted child shall on its death descend to the heirs of the adopting parent. There is no limitation on the descent of property taken as a natural heir, and it descends according to the general laws of descent. Lehallah Head's right in the property involved would be greater as a natural heir than as an adopted child. The court below held that she took two shares, one in each capacity, and stated conclusions of law accordingly, from which exceptions were taken by appellants, and this appeal prosecuted. This was error. We hold that Lehallah Head should take a one-fifth share in the surplus personal property of her adopted parent's estate, and should take that

share as his natural heir, in lieu of her deceased father.

Judgment reversed, with instructions to the court to restate its conclusions of law, and render judgment accordingly.

NOTE.—Reported in 111 N. E. 952. As to power to give child under existing adoption right to inherit from natural parent or parent's relatives, see 35 L. R. A. (N. S.) 216. As to right of an adopted child to inherit from persons other than adopted parents, see 4 Ann. Cas. 881; 9 Ann. Cas. 780. See, also, under (1) 1 C. J. 1400; 1 Cyc 933.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. CLOUD,
ADMINISTRATRIX.

[No. 8,607. Filed November 5, 1915. Rehearing denied January 27, 1916. Transfer denied March 17, 1916.]

1. PLEADING.—*Amendment Pending Trial.—Discretion of Court.*—Under a rule of the circuit court forbidding the filing of amendments without affidavit showing sufficient cause for not filing same before the issues were closed, and providing for the suspension of such rule when in the court's opinion the ends of justice would thereby be promoted, the court's action in permitting the amendment of the complaint immediately before trial so as to allege that the decedent at the time of his death was a brick mason by trade, earning five dollars a day, was not an abuse of the court's discretion, in view of defendant's right to have asked a continuance if necessary to its defense. p. 260.
2. COURTS.—*Rules.—Construction.—Appeal.*—The rules of a trial court are construed to be the law of the court made for the orderly conduct of business and for the protection of litigants, and on appeal the construction placed by a trial court on its rules of practice will be adopted unless it clearly appears that there has been substantial error in their construction and application. p. 260.
3. RAILROADS.—*Crossing Accident.—Instructions.—Application to Pleading and Issues.*—In an action for the death of plaintiff's decedent in a crossing accident, grounded on the theory that defendant's fireman and engineer negligently failed to see decedent approaching the crossing, and also that, seeing him, they negligently failed to check the engine in time to avoid the accident, where defendant offered evidence on contributory negligence and the court gave instructions at defendant's request on that theory, other

instructions given were unobjectionable and were applicable to the evidence and theory of the case, which in effect merely informed the jury that it was defendant's duty to keep a lookout for persons attempting to use the crossing, and that if decedent was in a position of danger or appeared to be, and if defendant's employes in charge of the engine as it approached the crossing knew the conditions, it immediately became their duty to use ordinary care to avoid a collision, and that if by the exercise of reasonable care they could have seen and known of decedent's peril and that he could not escape by the exercise of ordinary care, their failure to exercise such care would be negligence, regardless of whether some time before the collision they saw decedent in a place of safety, if by the exercise of reasonable care immediately thereafter and for some appreciable time before the collision they by the exercise of ordinary care discovered or could have discovered that from a place of safety decedent had actually entered a place of danger. p. 262.

4. RAILROADS.—*Crossing Accident.—Last Clear Chance.*—Where decedent was in a place where he had a right to be and was unable to remove himself, his negligence, if any, being antecedent, the defendant may be negligent under the last clear chance doctrine in not discovering his position of peril. p. 266.
5. APPEAL.—*Review.—Refusal of Instructions.*—A requested instruction containing an assumption not warranted by the evidence and also taking from the jury the question of contributory negligence, where under the facts such question was not one of law, was properly refused. p. 266.
6. DEATHS.—*Excessive Damages.*—A verdict of \$6,000 for the death of plaintiff's decedent was not excessive, in view of evidence showing that decedent was twenty-one years of age, strong and industrious, had no bad habits, used all his earnings to support his wife and maintain his home, was a brick mason earning four to five dollars a day, that he had a life expectancy of forty years, and that he worked at his trade from eight to nine months each year and performed other labor during the remainder of each year. p. 267.

From Randolph Circuit Court; *James S. Engle*, Judge.

Action by Lena E. Cloud, administratrix of the estate of Charles Cloud, deceased, against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Frank L. Littleton, Macy, Nichols, Goodrich & Bales, and *William F. Elliott*, for appellant.

W. G. Parry, for appellee.

IBACH, P. J.—Action for damages on account of the death of Charles Cloud, alleged to have been the result of appellant's negligence. The facts disclosed by the record are in the main concisely stated by appellee in her brief, and are substantially as follows: During the afternoon of December 12, 1911, Charles Cloud, the decedent, was driving north in a low buggy drawn by a pony, on Oak Street in the incorporated town of Lynn, Indiana. Oak Street was sixty feet in width and was crossed at right angles by five of appellant's tracks. The pony stopped frequently, probably balking, but would go forward when urged by Cloud. The pony finally stopped with its feet on the south track. It is about seventy-five or eighty feet from that point to the main track. An engine somewhere down the tracks began making a noise, blowing off steam. The pony became frightened, plunged, and became unmanageable, and ran toward the crossing, and it is admitted that Cloud did all he could to restrain and hold the pony. At this time, appellant's engine, running light, steam shut off, and moving at a speed of six to eight miles per hour, was approaching from the east, and the view from the eastward on the railroad track along Oak Street was unobstructed for some distance. At the crossing the engine collided with the buggy, Cloud still pulling back on the lines to check the pony. The collision occurred about eight feet west of the center of the street. The rig was struck between the front and hind wheels. No one seems to have seen the decedent after the collision until his mangled body was found about 100 feet west of the point where the rig was struck. There is some evidence tending to show that decedent was not killed or mortally wounded by the collision. Parts of the buggy were picked up on the west end of the crossing planks. The buggy tracks

showed that the west wheels passed west of the planks, and the east wheels on the planks. The engine stopped 80 to 100 feet west from where the body was found. Aside from the serious wounds that caused death there was only a scalp wound. The first blood was on the north rail 60 feet west of the street crossing and about 6 to 8 inches from the rail, and blood was scattered from that point west as far as the body. There was a pool of blood and one shoe near the body. The cinders between the rails were disturbed and appeared as though something had been dragged through them west from the first blood spot. Decedent's cap and buggy curtain were found at or west of the first blood spot, and pieces of flesh and bone 15 feet east of the body. His pocket-book and rule were 10 feet west of the blood spot. At or near the first blood spot were tracks and other marks indicating the place where the pony and what remained of the buggy were released from the engine. Witnesses near by at the time testified in substance that they saw the pony and part of the rig extending north from the engine as they were being carried down the track. The fireman who was standing on top of the tender, said he saw decedent when the pony was standing quietly and after that he looked straight ahead. He said he next saw the pony come around in front of the engine just after it came over the pilot. Just before seeing the pony, he heard the engineer apply the brakes, and felt the jar of it. The jar caused him to take two or three steps forward, and he then saw the pony. The engineer said he first saw the pony and rig "when they came over the pilot, the upper part of the pony was right back of the running board at the front cab window, the pony went to its knees, rose and turned in again"; as soon as he saw the pony the brake was immediately put on, but the

engine had run 30 or 40 feet before the reverse lever was thrown.

The case was tried on two paragraphs of amended complaint to which a general denial was filed. A general verdict was returned in favor of appellee for \$6,000, and with it the jury returned answers to interrogatories. These answers are in complete accord with the general verdict, so that in view of the state of the record and the errors relied upon, we refer only to a few of them particularly. The answers to interrogatories Nos. 8 to 15, inclusive, find the situation of the tracks, the approaching engine, the decedent in his buggy, and the collision just as those facts are stated in the complaint. In answer to interrogatory No. 17, which asked if decedent was killed or mortally wounded by the collision, the answer is no, and by the answer No. 19 it is found that the engineer might by ordinary diligence have stopped the engine after the collision in time to prevent Cloud's death. In answer to No. 21, it appears that the engineer did not see decedent until after the accident and the fireman did not see him until after his pony and broken buggy appeared on the north side of the main track; in answer to No. 24¹/₂ that decedent did not know that the pony would take fright at escaping steam; in answer to No. 23 and No. 24 that three seconds intervened between the time the pony started to run and the collision, and that the engineer could have stopped the engine in that time.

An amendment to the original complaint was permitted on the day of the trial, immediately before the case was called, over appellant's objection.

1. It is first contended by appellant that this was error, for the reason that it was done in violation of rule 7 of the Randolph Circuit
2. Court forbidding the filing of amendments without affidavit showing sufficient cause for

not filing the same before the issues were closed. The separate paragraphs of complaint were amended so as to contain this clause, "that at the time of his death the said Charles Cloud, was and for several years prior thereto had been a brick mason by trade, at which trade he worked, and at which he was earning and receiving, and had earned and received and was capable of earning, \$5 per day". At the time appellant sought to have the foregoing rule enforced, there was a further rule of the court, rule 21, which provided that "the application of the foregoing rules may be suspended when in the opinion of the court the ends of justice would thereby be promoted and all rights of the court in conflict with the above rules are hereby reserved". Such rules have always been construed to be the law of the court made for the orderly conduct of business and for the protection of litigants, and they ought generally to be upheld and enforced. It seems to have been the realization of the court that in some instances the enforcement of the rules would work an injustice, and therefore rule 21 was promulgated, and the bill of exceptions shows that the trial court thought he was justified in his ruling by rule 21. Wherever like questions have been presented, the courts seem to have held that the construction placed on its rules of practice will be adopted by the courts of appeal unless it clearly appears that there has been substantial error in their construction and application. *Mix v. Chandler* (1867), 44 Ill. 174; *Morrison v. Nevin* (1889), 130 Pa. St. 344, 18 Atl. 636; 11 Cyc 720. We find no error in the trial court's action in permitting the amendments to the complaint on the day of trial. Appellant might have asked a continuance if necessary to its defense, but did not.

The first paragraph of the amended complaint proceeds on the theory that appellant's fireman and

engineer failed to look for persons and vehicles

3. approaching the crossing and as a consequence negligently failed to see decedent, while it is charged in the second paragraph that they did see him approaching and unmindful of him, negligently failed to stop or check the engine in time to avoid the accident. In short, it is appellee's contention that appellant was negligent both before and after the collision, and that if appellant's servants had been looking ahead at either of these times, they could have prevented killing decedent. Of the instructions given on these theories, appellant says Nos. 7 and 8 were erroneous. They are as follows: "7. If the jury find by the preponderance of all the evidence in the case that the plaintiff's decedent was riding and driving in a buggy drawn by a pony hitched thereto, and so riding and driving approached the crossing over Oak Street in the town of Lynn, where the defendant company's line of road crosses the same, and when within a distance of about 75 feet, within a safe distance from said crossing, the pony so driven stopped on the highway or street before crossing over such railway tracks, and while standing at such point, the said pony became frightened at escaping steam or noise from the defendant's locomotive near said crossing, or became frightened and unmanageable from any cause, and started forward toward said crossing, jumping, rearing and plunging, and plaintiff's decedent was unable to restrain and hold said pony, and that he used diligence and his best endeavors and efforts to restrain and stop said pony in its course towards said crossing, and if you believe from the evidence that plaintiff's decedent thereby and by reason of the said conduct of said pony and his inability to manage and control the same, if he were unable to manage and control him, and the near approach of

the locomotive engine of defendant at that time to said crossing, if it were so approaching such crossing, and that thereby plaintiff's decedent was placed in a situation of imminent peril and danger, from which he was unable to extricate himself, and if the engineer in charge of the locomotive engine saw the plaintiff's decedent in his said perilous situation, if he were in a perilous situation from which he could not extricate himself, then it was the duty of such engineer to have used ordinary care and diligence to avoid coming in contact with said pony and said buggy, and said decedent and to avoid injury to him; or if, under the circumstances and facts above stated, by the exercise of ordinary care and diligence said engineer could have seen the plaintiff's decedent approaching said crossing, if he was so approaching the same, and could have seen and realized that the pony attached to and drawing said buggy in which plaintiff's decedent was riding and driving, was unmanageable, if said pony was so unmanageable, and that plaintiff's decedent was in peril from which he was unable to extricate himself, if such were the case, in time to have stopped his locomotive engine and avoid such contact and injury, by the exercise of ordinary diligence, if there was contact and injury, and the said engineer carelessly and negligently failed to look and to see the said deceased so approaching and failed, under the circumstances, to see plaintiff's decedent, and his perilous situation, if as before stated, he was in such perilous situation, such conduct on the part of such engineer in failing to see plaintiff's decedent and his said perilous situation, would be negligence on the part of such engineer in the discharge of his duties as such engineer toward plaintiff's decedent. 8. If the pony driven by plaintiff's decedent, became frightened and ran away with him and ran in front

of the defendant's locomotive engine as the same was passing over Oak Street in the town of Lynn, and the said pony and buggy was struck by said locomotive engine and carried and pushed along the railroad track in front of the locomotive engine by said contact a distance along said track, and if you believe from the evidence that plaintiff's decedent was unable to control said pony and he was carried on said track in said buggy and was thereby put in peril from which he was unable to extricate himself, and if after he was so put in peril, if he was in a perilous situation, the agents and servants of the defendant operating the said locomotive engine by the use of ordinary diligence, could have discovered plaintiff's decedent and his said perilous situation in time to have stopped said locomotive engine by the exercise of ordinary diligence and prevented it from passing over him and killing him, if it did so pass over him and kill him, and if said agents and servants of defendant negligently failed to discover the plaintiff's decedent and his said perilous situation and did not discover him and his said peril until after the said locomotive engine passed over the decedent, thereby causing his death, then in such case the negligence of plaintiff's decedent occurring prior to the time his pony became unmanageable and prior to his said perilous situation, if he was so negligent prior to said time, would not be a bar to the plaintiff's right to recover, if she is otherwise entitled to recover in this action. The law is, that if a person is in a situation of peril and danger from which he is unable to extricate himself, it matters not whether he is negligent in placing himself in such situation of peril, if he is injured by the negligence of another, either by negligence of the omission of duty, or by negligent acts of commission, his

said prior act of negligence is not a bar to his right to recover, if he is otherwise entitled to recover."

The claim is made by appellant that instruction No. 7 is "ambiguous and obscure because it leaves it an uncertainty whether the court intended to instruct the jury that it was the duty of the engineer to use diligence in watching the crossing over which his engine was about to pass, and that failure to use such diligence therein would be negligence if it resulted in injury to Cloud; or whether it was intended to charge that Cloud's peril was to be taken into consideration in determining what ordinary diligence required of the engineer, 'under the circumstances and facts above quoted' ". We do not consider these objections tenable. Appellant had introduced evidence on the issue of contributory negligence and tendered instructions which were given by the court on that issue, and for this reason doubtless, instructions Nos. 7 and 8 were given. These instructions do no more than inform the jury that it was appellant's duty to keep a lookout for persons attempting to use the crossing, and that if Cloud was in a position of danger from which he could not remove himself before the collision, or appeared to be in a perilous position, and if appellant's employes in charge of the engine as it approached the crossing at the time knew the conditions as they existed with reference to decedent, then it immediately became their duty to use ordinary care to avoid a collision with him; or if they could by the exercise of reasonable care have seen and known of such position of peril and that he was so situated that he could not escape therefrom by the exercise of ordinary care, the failure on the part of such employes to exercise such care would be negligence, and it could make no difference if, some time before the collision, the fireman saw decedent

in a place of safety, if by the exercise of reasonable care immediately thereafter and for some appreciable time before the collision, such fireman by the exercise of ordinary care discovered or could have discovered that from a place of safety decedent had actually entered a place of danger. We are of the opinion that instruction No. 8 goes no further than instruction No. 7, and when both are carefully considered, it becomes quite clear that they were applicable to the theories upon which the case was tried, were within the evidence, and were not ambiguous or misleading, but on the contrary, stated with sufficient clearness a proposition of law which has long been settled. *Leavitt v. Terre Haute, etc., R. Co.* (1892), 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866; *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005; *Union Pac. R. Co. v. Cappier* (1903), 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 539, note; *Smith v. Norfolk, etc., R. Co.* (1894), 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287, note.

Appellant's contention that actual discovery is necessary to invoke the doctrine of last clear chance is not applicable to cases such as this where a

4. person is in a place where he has a right to be and is unable to remove himself, his negligence, if any, being antecedent, the defendant under such doctrine may be negligent in not discovering such position of peril. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091; *Evansville, etc., Traction Co. v. Johnson* (1913), 54 Ind. App. 601, 97 N. E. 176.

Of the instructions refused, appellant discusses but one, No. 6. This instruction was properly refused. In the first place, it contains a

5. wrong assumption, that is, that decedent knew that the pony would take fright at escap-

ing steam. The evidence favorable to appellee on this point is that decedent did not know of such characteristic in the animal. The instruction, therefore, invaded the jury's province. It also takes from the jury the question of contributory negligence, and charges the jury as a matter of law, that certain facts, not sufficient, constituted contributory negligence. Appellant's brief throughout discloses that the errors on which it relies all hinge on the two main propositions that the decedent was negligent in attempting to drive his pony over the crossing under the circumstances, knowing that it would take fright at escaping steam, and that a short time before the accident he was seen by appellant's servants waiting in Oak Street south of the crossing, while they were approaching it, and at the time he was in a place of safety, but the evidence is to the contrary, and the jury definitely determines these two contentions against appellant.

The judgment in the case is for \$6,000, and appellant contends this is excessive, and should be set aside. The evidence showed that at the time

6. of his death Cloud was twenty-one years of age, strong and industrious, had no bad habits, used all his earnings to support his wife and maintain his home, was a brick mason earning from \$4 to \$5 per day, and worked at this trade from eight to nine months in each year, performing other labor during the remainder of the year. His expectancy was forty years. In passing on such questions neither the court or jury can have a well defined or fixed rule to follow in order that a correct conclusion may be reached. The amount of the damages is very largely problematical, consequently a wide range of deviation is allowed the triers of the case and the amount of damages finally determined will not be disturbed, unless it appears that some

improper motive has prompted the jury in ascertaining such sum, or the amount is clearly out of all proportion to the injury sustained. Under the evidence, we see no reason to disturb the award in this case. Judgment affirmed.

NOTE.—Reported in 110 N. E. 81. As to application of rule of last clear chance to person so close to track as to be injured by passing train, see Ann. Cas. 1912 B 1242. As to frightened or unmanageable team as excuse for contributory negligence at railroad crossing, see 16 Ann. Cas. 954. See, also, under (1) 31 Cyc 398; (2) 11 Cyc 742; (3) 33 Cyc 1129, 1132; (4) 33 Cyc 1047; (5) 38 Cyc 1633, 1658; (6) 13 Cyc 378.

THE TITLE GUARANTY AND SURETY COMPANY OF
SCRANTON, PENNSYLVANIA, v. STATE OF IN-
DIANA, EX REL. THE LEAVENWORTH
STATE BANK.

[No. 8,609. Filed June 18, 1915. Rehearing denied January 14, 1916. Transfer denied March 17, 1916.]

1. ASSIGNMENTS.—*Action on.*—Where the bond of a contractor for the construction of a public highway was conditioned for the payment of all debts incurred in the prosecution of the work, including labor and materials furnished, a bank, claiming to be the assignee of the claims of laborers and materialmen, was authorized, if its position was really that of an assignee, to maintain an action by virtue of such sale and assignment against the surety on the contractor's bond, in case of default in payment, in the absence of anything in the contract of assignment precluding the right to maintain such action. p. 272.
2. HIGHWAYS.—*Contractor's Bond.*—*Assignment of Claims.*—*Action.*—Where it appeared that claims for material and labor furnished in the construction of a highway were sold and transferred to plaintiff, and that in a transaction with the contractor that became connected with such transfer the contractor agreed, either with the laborers and materialmen or with plaintiff, to pay the claims out of the fund that would become due for building the road under the contract, such agreement by the contractor did not amount to an assignment creating a lien on such fund, and in no way restricted the rights of plaintiff as an assignee of the claims of such materialmen and laborers to prosecute an action on the bond of the contractor, in view of the fact that it was conditioned for the payment of all debts incurred in the prosecution of the work, including labor and material furnished. p. 273.

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3. **LIENS.**—*Equitable Liens.*—A mere agreement to pay out of a fund is not sufficient to create a specific equitable lien on the fund for the payment of the debt involved. p. 273.
4. **HIGHWAYS.**—*Action on Contractor's Bond.*—*Assignments.*—*Evidence.*—In an action on the bond of a contractor for the construction of a highway, brought by a bank claiming to be the assignee of claims for labor and material furnished, where the evidence showed an arrangement between plaintiff and the contractor whereby plaintiff was to honor the checks given by the contractor to laborers and materialmen, that the arrangement was carried out by the bank paying the checks or orders, which showed the purpose for which they were intended, that the contractors had no funds in the bank, but at intervals executed notes to the bank for amounts advanced by it, such bank was not an assignee so as to sue on the contractor's bond conditioned for the payment of the claims of laborers and materialmen, although it was further shown that the bank preserved such checks to be used in settlement with the contractor, and made no entry of their payment on its books. p. 275.
5. **BONDS.**—*Contractor's Bond.*—*Construction.*—“*Including*”.—The word “including” as used in the bond of a contractor, conditioned for the payment of all debts incurred in the prosecution of the work, including labor and materials furnished, expresses the idea of a class comprehending as a part of its members certain things specifically mentioned or to which particular attention is directed, and the class indicated by the expression “debts incurred” is not necessarily exhausted by the specific debts referred to as growing out of labor preformed and material furnished, so that the bond literally interpreted secures the payment of all debts incurred in the prosecution of the work. p. 279.
6. **PRINCIPAL AND SURETY.**—*Contract.*—*Construction.*—A surety for profit is not a favorite of the law, and is deemed an insurer rather than a surety, so that the contract of a surety for profit will be construed most favorably to the person intended to be protected thereby. p. 280.
7. **HIGHWAYS.**—*Contractor's Bond.*—*Construction.*—The bond of a highway contractor, conditioned for the payment of all debts incurred in the prosecution of the work, including labor and materials furnished, was liable or an indebtedness due a bank which, pursuant to an arrangement with the contractor, honored the checks of the contractor issued for labor and material used in building the highway. p. 280.
8. **HIGHWAYS.**—*Contractor's Bonds.*—*Power of Board of Commissioners.*—While §7723 Burns 1908, Acts 1905 p. 521, §74, requiring the bond of a contractor for the construction of a highway to be conditioned for the payment of laborers and materialmen, did not require a condition for the payment of all debts incurred, the board of county commissioners had authority to accept a bond with such additional requirement and holders of general claims against the

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contract, incurred in connection with the work, could sue on such bond. pp. 281, 291.

9. **APPEAL.**—*Review.*—*Harmless Error.*—*Variance.*—In an action on the bond of a contractor by one claiming to be an assignee of claims for labor and material, where the evidence showed that plaintiff was not an assignee but that the indebtedness was due plaintiff through a direct arrangement between plaintiff and defendant, the variance between the pleading and proof was immaterial in view of a showing that a right result was reached, and the complaint was deemed amended to conform to the proof. pp. 290, 294.

From Harrison Circuit Court; *William Ridley*, Judge.

Action by the State of Indiana, on the relation of The Leavenworth State Bank, against The Title Guaranty and Surety Company of Scranton, Pennsylvania, and others. From a judgment for relator, the defendant named appeals. *Affirmed.*

Major A. Downing, Samuel A. Lambdin and Major W. Funk, for appellant.

Evan B. Stotsenburg and John H. Weathers, for appellee.

CALDWELL, J.—This action was prosecuted by appellee against appellant, as surety, and Fisher and Stabler, as principals, on a bond given to secure the performance of a contract for the construction of a free gravel road. The cause was tried on the second paragraph of amended complaint hereinafter referred to as the complaint, the material allegations of which are to the following effect: By a proceeding regular in all respects, the Board of Commissioners of Crawford County entered into a contract in writing with Fisher and Stabler, for the construction of a free gravel road in said county. Said contractors filed with their bid, a bond which was duly approved by the county auditor. The bond was conditioned that the contractors should enter into a contract for the performance of the work, and should faithfully perform the same, and should

“promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished and for the boarding of the laborers thereon”. Copies of the contract and bond were made parts of the complaint. It is further alleged that the contractors in prosecuting said work failed to perform the conditions of their bond, in that they failed to pay for labor and materials furnished by a large number of persons, a tabulated statement of which is made a part of the complaint. The allegations of the complaint that become important in view of the questions raised respecting its sufficiency are as follows: “That said laborers and materialmen transferred their claims to this relator for full value, and with the agreement with said contractors that said claims should be paid out of the fund for building said road, and this relator paid said laborers and materialmen the full value of said claims, and now holds the same; that all of said labor so mentioned therein, and all of said materials went into the construction of said free gravel road”, etc. There are other allegations that the amount and value of said claims is \$2,500; that payment was demanded and refused, and that said sum is due and unpaid.

Appellant’s demurrer for want of facts, filed to the complaint, was overruled, whereupon appellant answered by general denial. A jury trial resulted in a verdict against appellant in the sum of \$2,250, on which judgment was rendered, and from which judgment this appeal is prosecuted. The following questions are properly presented for review: (1) The overruling of the demurrer; (2) the sufficiency of the evidence to sustain the verdict; (3) the overruling of appellant’s motion for a peremptory instruction at the close of appellee’s evidence in

chief; (4) the overruling of a like motion at the close of all the evidence.

As we interpret appellant's argument directed against the complaint, it is to the effect that there is no allegation that the claims were trans-

1. ferred to appellee absolutely; that it appears from the complaint that the claims were assigned to appellee pursuant to a supplemental or independent contract to the effect that they should be paid out of the designated fund, as evidenced by the language "with the agreement with said contractors that said claims should be paid out of the funds for building said road"; that the right to resort to the bond constitutes no part of such fund, and that appellant was not surety for the performance of such independent or additional contract, and hence can not be held liable in this action. The incurring of the indebtedness by the contractors for labor and materials furnished and used in the performance of the work, and the failure of the contractors to pay such indebtedness when due rendered appellant liable in an action brought on the bond by the persons who performed such labor and furnished such materials, in the absence of a transfer of the claims so arising. If the claims were sold and assigned to appellee, then appellee became authorized, by virtue of such sale and assignment, to maintain an action on the bond against appellant as surety, in case of default in payment, unless there was something in the contract of assignment that precluded the right to maintain such action. *Hart v. State, ex rel.* (1889), 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; *Lane v. State, ex rel.* (1896), 14 Ind. App. 573, 43 N. E. 244.

We proceed to determine whether there was anything in the contract of assignment, as appears

from the complaint, to which such an effect

2. must be ascribed. It plainly appears from the complaint that said claims were sold and transferred to appellee, and that appellee thereby became the owner of them. There is a further averment to the effect that at the time the claims were transferred, or at some other time, and in a transaction that became connected with such transfer, the contractors agreed either with the laborers and materialmen or with appellee, that they would pay the claims out of the fund that would become due to them for building the road under the contract; in short, the contractors simply agreed that they would collect said fund and apply it on the claims. It seems to be appellant's construction of said alleged agreement that thereby the contract price for building the road became a special or primary fund set apart for the payment of these claims, to which it was the duty of appellee to resort, to the exclusion of any right to have recourse to the bond, and that as appellant did not sustain the relation of surety to the arrangement out of which such duty arose, appellant can not be held liable in this action. We can not agree that appellant is right in such contention. From the facts alleged, it does not appear that a specific right to resort to such fund arose, unless from such facts it may be gathered that thereby said fund was assigned to the end that said claims might be paid, or that thereby a lien

3. on such fund was created for that purpose.

A mere agreement to pay out of a fund is not sufficient to create a specific equitable lien on the fund for the payment of the debt involved. *Burke v. Child* (1875), 21 Wall. 441, 22 L. Ed. 623. Para-

phrasing the language used by the Supreme

2. Court of this State as applicable here, it was the duty of the contractors, as we have said,

to pay the claims, and their promise to pay them out of a particular fund imposed no additional legal obligation upon them. The promise to pay the claims out of the fund named conferred no benefit on appellee, as such promise did not operate as an assignment to appellee of the fund or give appellee control of it. Such promise did not operate as an assignment of the fund or create a lien thereon. *Ford v. Garner* (1860), 15 Ind. 298. "In order to constitute an assignment, either in law or equity, there should be such an actual or constructive appropriation of the subject-matter assigned, as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise. A covenant, on the part of the debtor, to apply a particular fund in payment of the debt, as soon as he receives it, will not operate as an assignment; for it does not give the covenantee a right to the fund, save through the medium of the covenantor, and looks to a future act, on his part, as the means of rendering it effectual; while the characteristics of an assignment are, the relinquishment of all legal or equitable interest by the assignor, and the creation of a new and independent right in the assignee." *Ford v. Garner*, *supra*, quoting 2 Lead. Ca. Eq. pt. 2, 233. See, also, *Burton v. Morrow* (1892), 133 Ind. 221, 229, 32 N. E. 921; *Tiernan v. Jackson* (1831), 8 L. Ed. 234, note; *Christmas v. Gains* (1871), 14 Wall. 69, 20 L. Ed. 762; *Walker v. Brown* (1896), 41 L. Ed. 865, note; *Siegmund v. Kellogg-Mackay-Cameron Co.* (1906), 38 Ind. App. 95, 99, 77 N. E. 1096; *Harrison v. Wright* (1885), 100 Ind. 515, 50 Am. Rep. 805; 4 Cyc 47; 2 R. C. L. 615. Moreover, the suit here is not based on the promise to pay the claims out of the fund named. It is grounded on the bond. It is not contended that the alleged

promise released the contractors from the obligation to pay generally. Such contention would be unavailing under the facts alleged. If the contractors were not released from such general obligation to pay, and if there was no assignment of the fund or lien created thereon, appellant was not affected by such promise, and on default in payment, liability on the bond arose. The promise to pay out of the fund gave appellee no new or additional cause of action. On default in payment, appellee's cause of action became as complete without such promise as with it. In either case, appellee became entitled to maintain an action against the contractors on the claims, or against them and appellant on the bond. For the payment of a judgment recovered in any such suit, recourse might be had to said fund, not specifically as a fund appropriated for that purpose, but generally as any other fund or property might be subjected to that end. *Ford v. Garner, supra*, 302. The court did not err in overruling the demurrer to the complaint.

We proceed to consider the sufficiency of the evidence. The following facts were established without contradiction: About the time the work

4. of building the road was commenced, the contractors arranged with appellee bank that the former should issue, to persons who performed labor and furnished materials in building the road, checks drawn on appellee bank, and that appellee should pay these checks when presented, and that the contractors should reimburse appellee out of the funds received for the work, as estimates were made. Pursuant to such arrangement, the contractors issued to laborers and materialmen a large number of checks, which were paid by appellee as presented. A number of such checks were presented in person by the payees, and others came to appel-

lee, and were paid after they had been cashed by other banks. In all cases, the checks bore the endorsements of the payees. Each check showed on its face that it had been drawn for labor performed or material furnished in building the highway. Appellee designated these checks as orders. No entry of their payment was made on appellee's books, but they were preserved to be used in settlement with the contractors. The contractors at no time had a deposit in the bank against which the checks were drawn, but they were in all cases paid out of funds of the bank. When checks to the amount of \$400 had been paid, the contractors executed to appellee a promissory note for that sum, and two additional notes for \$750 and \$1,000 respectively, when additional checks aggregating those respective amounts had been paid. The notes were entered on the books of the bank. At the trial appellee designated them as memoranda, rather than notes. The contractors failed to discharge their obligations held by the bank. The laborers and materialmen to whom the checks were issued were not parties to the arrangement made between appellee and the contractors, and had no knowledge of the same.

It is contended by appellee that under these facts, the claims represented by such checks and afterwards embodied in said notes or memoranda were not satisfied and discharged as obligations in the transaction in which appellee advanced and paid to the holders thereof the sums represented by them, but that they were thereby kept alive and passed to appellee as assignee thereof and that, as such assignee, appellee was authorized to maintain this action on the bond, because of the failure of the contractors to pay them in the hands of appellee, as debts incurred by the contractors by reason of

labor performed, and materials furnished in the building of the road. If appellee did thereby become such assignee, then under authorities already cited, appellee is correct in such further contention. Appellant, however, takes the position that the transaction as arranged and carried out was in the nature of a loan of money and the satisfaction and payment of claims rather than their assignment; that the claims thereby lost their identity, and a new indebtedness originated, based on such loan, and that such new indebtedness is not covered by the provisions of the bond respecting the payment of the claims incurred through labor done and material furnished. In our judgment, appellant is right in such contention. By an arrangement between appellee and the contractors, and to which the laborers and materialmen were not parties, and of which they had no knowledge, appellee agreed to advance the money to be used in the payment of the claims as it should be needed for that purpose, which money the contractors agreed to repay to appellee. There was no evidence of any agreement or understanding that the claims should be deemed to be assigned and kept alive in the transaction in which they were in fact paid. The checks were issued, presented, endorsed and paid as other checks, save for the presence of the distinguishing feature that the drawers had no funds in the bank from which such payment should be made. By reason of such distinguishing feature, the bank might have contracted for the purchase and assignment of the claims. Such a contract, if made and executed, would have resulted in the preservation of the claims in their original nature. The bank in fact, however, contracted to advance the money for the payment of the claims, and that the contractors should repay to the bank the money so

advanced. This arrangement was executed. There was no fact or circumstance shown indicating that the payees of the checks contracted to assign them or that they understood that they were so doing. To us it seems that there can be no doubt that the bank might have maintained an action against the contractors on the new indebtedness as such, and as so created. The transaction could not amount to both an absolute assignment of an existing indebtedness and the creation of a new indebtedness respecting the same items. The agreement here was express, and hence it can not successfully be contended that the law will presume an assignment. We hold that under the evidence the claims were not assigned, and that this action can not be maintained on the bond, for their nonpayment, as claims for labor done and materials furnished. See the following: *United States v. Rundle* (1901), 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505; *Martin v. Michigan, etc., R. Co.* (1886), 62 Mich. 458, 29 N. W. 40; *Hardaway v. National Surety Co.* (1907), 150 Fed. 465, 80 C. C. A. 283; affirmed in *Hardaway v. National Surety Co.* (1909), 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321; *Dudley v. Toledo, etc., R. Co.* (1887), 65 Mich. 655, 32 N.W. 884. Our attention is called to *Missouri, etc., R. Co. v. Brown* (1875), 14 Kan. 557. The opinion in that case contains but a meager statement of the facts involved. From such facts, it seems to us to be out of harmony with the weight of authority. An effort is made in *Martin v. Michigan, etc., R. Co.*, *supra*, to distinguish it on the ground of the scope of the Kansas statute. Except as distinguished, the supreme court of Michigan in the *Martin* case declines to follow it.

The conclusion at which we have thus arrived necessitates a reversal, unless it be that another

view of the case justifies an affirmance. As

5. we have indicated, the bond here is conditioned, among other things, that the contractors "shall promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished", etc. We are required to ascertain, first the relation existing between the ideas expressed respectively by the words "all debts incurred", etc., and "labor, materials furnished", etc., as indicated by the word "including". The connection in which this word is used under various circumstances may shape its meaning somewhat. Under some circumstances, or in some connections, perhaps, it may be used as a word of limitation or enumeration; that is, to the effect that certain specific things mentioned comprise all of the class designated by some general expression. In the quoted provision of the bond here, the word "including", in our judgment, is used to express the idea of a class comprehending as a part of its members certain things specifically mentioned or to which particular attention is directed; that is, the class indicated by the expression "debts incurred", etc., is not necessarily exhausted by the specific debts referred to as growing out of labor performed or material furnished. The purpose as expressed by the bond is to secure the payment of debts incurred in the prosecution of the work. Among such debts are those growing out of labor performed and material furnished. But if there are other debts, regardless of their nature or origin, that sustain such an intimate, immediate and exclusive relation to the building of the road that it may be said that such debts were incurred in the prosecution of that work, they too are covered by the provisions of the bond literally interpreted. See *Montello Salt Co. v. State* (1911), 221 U. S. 452, 31 Sup. Ct. 706, 55 L.

Ed. 810, Ann. Cas. 1912 D 633, 22 Cyc 62, notes; 4 Words and Phrases, "including" 3500.

Appellant is a surety for profit, rather than for accommodation. Such a surety is not "a favorite of the law". Its status is in the nature of an

6. insurer rather than a surety. It follows that if the contract of suretyship here is fairly open to two constructions, that construction will be adopted which is most favorable to the persons intended to be protected by the bond. *United States Fidelity, etc., Co. v. Poetker* (1913), 180 Ind. 255, 102 N. E. 372; *Kansas City v. Davidson* (1910), 154 Mo. App. 269, 133 S. W. 365; *Hormel & Co. v. American Bonding Co.* (1910), 33 L. R. A. (N. S.) 513, note.

From our statement of the facts, it appears that as one of the steps in the prosecution of the work of building the road, the contractors made the

7. arrangement with appellee for the payment of the claims for labor to be done and material furnished. This arrangement was made with specific reference to such work. All the claims involved in this action were paid by appellee under such arrangement. They were claims for labor performed and materials furnished in the building of the road. It would, therefore, seem that the contractors' liability thus arising is an indebtedness "incurred by them in the prosecution of said work". In *City of Alpena v. Title Guaranty, etc., Co.* (1909), 158 Mich. 678, 123 N. W. 1126, a statute involved required that contracts for public work be accompanied by a bond to secure the payment of all claims for labor performed and materials furnished in prosecuting the work. It is there held that claims for labor performed and materials furnished in repairing a dredge and other machinery used by the contractor in performing the work were not covered

by the bond. The basis of the decision is that the repairs rendered a utility available not only for performing the particular work, but with a surplus of the utility over, that might be used in other work. It is apparent that that decision is sound. If it should be held that such a claim were within the surety contract of liability, it would follow that a claim arising from the purchase of a new dredge required in performing the work, but which might also be used in conducting many subsequent enterprises of a like nature, or with a surplus value on the market, is also covered by such a bond. That case is easily distinguishable from the case at bar. The benefit which the contractors here arranged to receive from appellee was of such a nature that it could not be applied on any work except the building of the road. It was so applied, and thereby exhausted with no surplus over. See, also, *Standard Boiler Works v. National Surety Co.* (1912), 71 Wash. 28, 127 Pac. 573, 43 L. R. A. (N. S.) 162, note.

Apparently the proceeding involved here for the building of the free gravel road was brought and prosecuted under the provisions of §62 et

8. seq. of the act of 1905 (Acts 1905 p. 521, §7711 Burns 1908), commonly known as the three-mile gravel road law, although that fact does not specifically appear. Section 74 of that act being §7723 Burns 1908, Acts 1905 p. 521, provides among other things, that with his proposal, each bidder "shall submit his bond * * * to the approval of the board, conditioned for the faithful performance of the work * * * which bond shall be for the benefit of any person or corporation who shall suffer loss or damage by reason of any failure or neglect of such bidder to enter into a proper contract * * * , or to pay for any labor or material

therefor that shall have been furnished either to him or to any sub-contractor, agent or superintendent under him." The bond here is conditioned among other things that the contractors "shall promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished and for the boarding of laborers thereon." It is thus apparent that the bond here is conditioned more broadly than required by said section, in that it contains the provision respecting the payment of all debts incurred and all claims for boarding laborers. There is, however, no statute that prohibits a board of county commissioners from taking or requiring a bond thus broadly conditioned. Section 4 of the act of 1899 (Acts 1899 p. 170, §5592 Burns 1901), makes it the duty of boards of commissioners in receiving bids for certain public works to take a bond conditioned in the exact language of the provision above quoted from the bond involved here. Independent of the statute last mentioned, the situation here presents the question of whether the board exceeded its power in causing to be inserted in the bond the provision for the payment of debts incurred by the contractors in the prosecution of the work, regardless of the nature or origin of said debts, or in accepting a bond voluntarily executed and so conditioned, and whether such provision is enforceable. The question has frequently come before the courts as to whether boards of county commissioners and municipal authorities have the power, in the absence of an express statutory grant, to insert in such a bond an enforceable provision for the payment of claims for labor performed and materials furnished in the construction of the public work involved. With practical uniformity, it has been held that while such public bodies may exercise only granted powers, yet

that express authority to cause the work to be performed carries with it the incidental power to do all proper acts reasonably necessary to that end; and that by virtue of such incidental power, such bodies may cause such a provision to be inserted in the bond, in the absence of express statutory authority to that effect.

The right to exercise such incidental power in cases where the public body is authorized to contract for improvements is sustained on the theory that thereby skilled labor and good materials may be more easily procured, and as tending to promote justice and equity among all persons contributing to the performance of the work. See the following: *United States Gypsum Co. v. Gleason* (1908), 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 906; *Knapp v. Swaney* (1885), 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; *Des Moines, etc., Works v. Marzen & Rokahr* (1910), 87 Neb. 684, 128 N. W. 31; *American Surety Co. v. Lauber* (1899), 22 Ind. App. 326, 53 N. E. 793; *Young v. Young* (1899), 21 Ind. App. 509, 52 N. E. 776; *Williams v. Markland* (1896), 15 Ind. App. 669, 44 N. E. 562; *Brown v. Markland* (1899), 22 Ind. App. 652, 53 N. E. 295; *King v. Downey* (1900), 24 Ind. App. 262, 56 N. E. 680; *Hines v. Consolidated Coal, etc., Co.* (1902), 29 Ind. App. 563, 64 N. E. 886; *City & County v. Hindry* (1907), 40 Colo. 42, 90 Pac. 1028, 11 L. R. A. (N. S.) 1028, note; *Jenkins v. Chesapeake, etc., R. Co.* (1913), 49 L. R. A. (N. S.) 1166, note 1183; *National Surety Co. v. Hall-Miller, etc., Co.* (1913), 104 Miss. 626, 61 South. 700, 46 L. R. A. (N. S.) 325; 29 Cyc 1040; 4 McQuillin, Mun. Corp. §1690. Where such a body is authorized to contract for public improvements, if it may by virtue of such incidental power take an enforceable bond to secure the payment of claims for labor and

material, no reason occurs to us why such a bond may not be taken containing an additional provision securing the payment of any other debt incurred by the contractor in pursuing the work, where the nature of the debt is, such that the improvement not only was to but also actually did receive its full and exclusive benefit.

In *City of Philadelphia v. Nichols* (1906), 214 Pa. St. 265, 63 Atl. 886, where a public improvement ordinance specified the scope of the bond, it was held that a bond voluntarily given, but more comprehensive than specified, might be enforced according to its terms. In that case, and in others in harmony with it, importance is attached to the element that the bond involved was voluntarily given, and that it was not prohibited by statute. In some instances such bonds are enforced as common-law rather than statutory obligations. See the following: *Waterous, etc., Co. v. Village of Clinton* (1910), 110 Minn. 267, 125 N. W. 270; *Farr v. Rouillard* (1899), 172 Mass. 303, 52 N. E. 443; *McIntire v. Linehan* (1901), 178 Mass. 263, 59 N. E. 767; *Stephenson v. Monmouth Min., etc., Co.* (1897), 84 Fed. 114, 28 C. C. A. 292; *Whitsett v. Womack* (1845), 8 Ala. 466; *Miller v. Vaughn* (1884), 78 Ala. 323; *United States v. Maurice* (1823), Fed. Cas. No. 15,747; *United States v. Hodson* (1870), 77 U. S. 395, 19 L. Ed. 937; *United States v. Tingey* (1831), 5 Pet. *115, 8 L. Ed. 66. In *United States v. Hodson, supra*, the bond involved was given by a distiller to secure a compliance with the revenue statutes. The court in holding the bond enforceable as given, although broader in its provisions than required by statute, said: "The record is silent as to any coercion or duress. The bond is, therefore, to be considered a voluntary one. A bond in this form is not prohibited by the statute,

nor is it contrary to public policy. It was founded on a sufficient consideration, and it was intended to subserve a lawful purpose." The government was the obligee in the bond involved in that case, and also in the bond involved in *United States v. Tingey, supra*. In the former, the court in commenting on the latter said: "The bond was held to be valid. The decision was put on the grounds that the government had the capacity to make the contract, that the United States were a body politic, and that, as an incident to its general right of sovereignty, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided in it by the Constitution." The question being one of power, we fail to see the distinction between the validity of an act done by the government pursuant to a power incident to sovereignty, and an act done by a board of commissioners pursuant to a power incident to authority expressly granted.

There is, however another viewpoint from which this case should be considered. As we have indicated, the highway proceeding involved here was apparently prosecuted under the act of 1905, of which §7723 Burns 1908, *supra*, is a part. The bond here, however, as we have said, is conditioned in the language of §4 of the act of February 27, 1899, being §5592 Burns 1901, *supra*, which in so far as concerns the provision for the condition of the bond is the same as §1 of the act of March 14, 1877 (§4246 R. S. 1881, §5592 Burns 1894), and §4 of the act of February 27, 1899 (Acts 1899 p. 170, §5592 Burns 1901), *supra*, and §5 of the act of April 10, 1907. Acts 1907 p. 580, §5897 Burns 1908. *State, ex rel. v. Sullivan* (1881), 74 Ind. 121, involved a bond given in a proceeding to construct a road under the provisions of the act of March 3, 1877. Acts 1877 p. 82, §6855 Burns

1894, §5091 *et seq.* R. S. 1881. Section 5 of that act (§5095 R. S. 1881) required that the contractor give "such reasonable security for the proper performance of his contract * * * as the county commissioners may deem expedient." A bond was in fact given by the contractor, conditioned not only for the proper performance of the work, but also that the contractors should "promptly pay all debts incurred by them in the prosecution of such work, including labor and the boarding of laborers at work thereon." It was held that §4246 R. S. 1881, *supra*, was authority for taking such a bond. This section provides that "no bid for the building or repairing of any court house * * * or other county building or work shall be received or entertained * * * unless such bid shall be accompanied by a * * * bond * * * which bond shall guarantee the faithful performance of the work * * * and that the contractor * * * shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished and for boarding the laborers thereon." There is a like holding in *Dewey v. State, ex rel.* (1883), 91 Ind. 173; *Faurote v. State, ex rel.* (1887), 110 Ind. 463, 11 N. E. 472; and *Hart v. State, ex rel.* (1889), 120 Ind. 83, 21 N. E. 654, 24 N. E. 151. In the *Faurote* case, the court said: "Section 4246 is a general provision and applies to all bonds taken in connection with contracts for public works, which boards of commissioners are authorized to make." But in *State, ex rel. v. McCray* (1892), 5 Ind. App. 350, 32 N. E. 341, involving a suit on a bond given in a highway proceeding brought under the act of July 18, 1885 (Acts 1885 p. 162, §6879 *et seq.* Burns 1894), it was held that such bond could not be supported or extended in its terms by recourse to said §4246 R. S. 1881,

§5592 Burns 1894. Section 10 of the act of 1885 (Acts 1885 p. 162, §6888 Burns 1894) provides that a bond shall accompany the bid, but the act is silent as to the conditions of the required bond. The decision in the McCray case is based on two grounds: (1) a specific admission that the bond was executed under the provisions of said §10; (2) the fact that under the latter act, the superintendent of construction is required to receive the bond, and that he alone is authorized to sue on it, while the bond provided for by said §4246, *supra*, is taken by the commissioners, and that laborers and others as beneficiaries thereunder may sue on it. *State, ex rel. v. McCray, supra*, seems to be in conflict with *Lane v. State, ex rel.* (1896), 14 Ind. App. 573, 43 N. E. 244. In the latter case, it is held that in a highway proceeding, brought either under the act of 1877, *supra*, or under said act of 1885, a bond may be taken and enforced under the provisions of said §4246 R. S. 1881, *supra*, the court saying that there can be no doubt that a bond given by a contractor under the act of 1885 is governed by §4246, *supra*, citing *State, ex rel. v. Sullivan, supra*, and *Herrod v. State, ex rel.* (1896), 15 Ind. App. 648, 43 N. E. 144, 44 N. E. 378. The Lane case endeavors to distinguish the McCray case on the ground that the bond involved in the former contained a condition that the contractors "should promptly pay all debts incurred by them in the prosecution of the work, including labor, materials furnished and for the board of laborers", as provided by §4246, thus indicating that the bond was executed with a view to that section. It is somewhat difficult, however, to harmonize the two cases. It may be said also that *Hart v. State, ex rel., supra*, does not seem to be in entire accord with *Faurote v. State, ex rel., supra*, and *Robling v. Board, etc.* (1895), 141 Ind. 522, 40

N. E. 1079, in certain particulars. The disparity, however, if it exists, is not important here. There are some reasons in support of a conclusion that none of the cases cited are controlling in the situation presented by the case at bar. Thus, the road involved in each of the cases, *State, ex rel. v. Sullivan, supra*; *Dewey v. State, ex rel., supra*; *Faurote v. State, ex rel., supra*; and *Hart v. State, ex rel., supra*, was built under the act of March 3, 1877. Section 5 of that act (§5095 R. S. 1881, *supra*) made provision for a bond by the use of general language, that the successful bidder "shall give such reasonable security for the proper performance of his contract * * * as the county commissioners may deem expedient." The road involved in *Lane v. State, ex rel., supra*, was built under the act of 1885. Section 10 of that act (§6888 Burns 1894, *supra*) provided merely that "a bond executed by the bidder * * * shall accompany such bid." The act was silent as to the scope of the bond. The court in *Faurote v. State, ex rel., supra*, in holding that a bond may be taken under the provisions of said §4246 R. S. 1881, *supra*, where the road is built under said act of March 3, 1877, bases the decision on the fact that §5095, *supra*, provided generally that reasonable security be given, while §4246, *supra*, described specifically the character of all bonds to be taken by county commissioners on letting contracts for the construction of county work. It would seem that the basis of the decision in the *Faurote* case would not support a like decision in the case at bar. Section 74 of the act of 1905, under which the road here was built, being §7723 Burns 1908, *supra*, provides specifically respecting the scope of the bond, in that it shall be conditioned for the faithful performance of the work, and that it "shall be for the benefit of any person or corpora-

tion who shall suffer loss or damage by reason of any failure or neglect of such bidder * * * to pay for any labor or material therefor, and that shall have been furnished either to him or to any sub-contractor, agent or superintendent under him."

There is an additional reason: The subject-matter of the act of March 14, 1877, of which §4246 R. S. 1881, *supra*, forms a part, as indicated by its title, is indemnity to counties and protection of laborers, materialmen and others "from loss by persons contracting for county buildings and work." In *State, ex rel. v. Sullivan, supra*, and cases following it, in holding that a bond may be given under §4246, stress is placed on the fact that road building by the county commissioners is county work. At the time of the letting of the contract here, the act of February 27, 1899, of which §5592 Burns 1901, *supra*, is a part, had succeeded said act of March 14, 1877. While §4246, *supra*, of the latter act is included in substance in §4 of the act of 1899, *supra*, and the same language is used in each in specifying the condition of the bond, the title of the latter act designates certain specific kinds of county work, as court houses, jails, etc., as the subject-matter of legislation, but employs no general terms to that end. There is then at least some doubt whether it may be said that the bond in the case at bar is authorized by §5592, *supra*. We hold, however, that the board of county commissioners here was authorized to take said bond as conditioned, and that it is enforceable according to its terms. Authority to take such bond as enlarged in scope beyond the provisions of §7723 Burns 1908, *supra*, we prefer to base on the incidental powers of the board rather than on the provisions of said §5592 Burns 1901, *supra*. We do not

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regard *State, ex rel. v. Fletcher* (1891), 1 Ind. App. 581, 28 N. E. 111, or *United States Fidelity, etc., Co. v. Poetker, supra*, as in conflict with our conclusion. A different sort of bond was under consideration in each of those cases, and no question of the incidental or implied powers of a public board or official is involved in either of them.

The complaint declares on claims for labor performed and materials furnished as assigned to appellee. We have held that under the evidence,

9. such claims were paid rather than assigned, and that the transaction relied on as showing an assignment in fact resulted in the creating of an indebtedness in favor of appellee. A case of variance between allegation and proof is thereby presented. It is provided by statute that such a variance is not to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense; but where such adverse party shows to the court that he has been so misled and in what respect, the court may order the complaint amended on such terms as may be just. §400 Burns 1914, §391 R. S. 1881. It is further provided that where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. §401 Burns 1914, §392 R. S. 1881. There is a further provision that no judgment shall be reversed for any defect in form, variance, etc., which might be amended by the court below, but such defect shall be deemed to be amended in the appellate tribunal, and that no judgment shall be reversed where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. §700 Burns 1914, §658 R. S. 1881.

These sections of the code when properly applied

tend to promote the ends of justice, and to minimize the effect of errors, and defects, technical in nature. They should not be weakened by construction, but mindful of the rights of the parties that may be injuriously affected, they should be given full force. Here all the material facts were established without contradiction. In short, there is no controversy respecting the facts. Although difficult questions of law are thereby presented, conflicting inferences of fact can not be reasonably deduced from the evidence. Under such circumstances, the complaint should be deemed to be amended to conform to the proof. The complaint being amended, the evidence sustains the verdict. Our discussion of the evidence disposes of other questions that are properly presented. Judgment affirmed.

ON PETITION FOR REHEARING.

CALDWELL, J.—Appellant, by its petition for a rehearing, earnestly and ably contends that the court in its original opinion erred in two material respects, to the following effect: (1) In holding that the bond involved in this action, although broader in its conditions than required by the statute under which it was apparently given, may nevertheless be enforced according to its terms. (2) In applying §§400, 401, 700 Burns 1914, §§391, 392, 658 R. S. 1881, in order that the judgment below might be affirmed.

Respecting the first point, the holding is substantially that where a board of county commissioners is authorized by a statute to con-

8. tract for the performance of a work of public improvement, it may, by virtue of its incidental powers, require of the contractor the execution of a bond with surety, conditioned for the proper performance of the work and other matters properly

related thereto, even in the absence of a statute providing that such a bond be taken; that where a statute requires that a bond be taken, conditioned as specified by such statute, the board may, by virtue of such incidental powers, take a bond more broadly conditioned than required by the statute, provided the statute does not prohibit the taking of such a bond, and if the matter of the additional provisions is properly related to the work of the improvement, and that if such a bond be voluntarily given in consideration of the contract it may be enforced according to its terms. It is now contended that this court in developing such general principles and in specifically applying them ran counter to certain decisions of the supreme court and also of this court, as *United States Fidelity, etc., Co. v. Poetker* (1913), 180 Ind. 255, 102 N. E. 372; *State, ex rel. v. Heim* (1915), 58 Ind. App. 654, 108 N. E. 776; and *State, ex rel. v. Fletcher* (1891), 1 Ind. App. 581, 28 N. E. 111.

In the Poetker case, a bank cashier's bond was involved. It was executed pursuant to a statute, the terms of which required that the board of directors take from the cashier a bond with surety, conditioned as specified by the statute. The bond as in fact executed contained limitations the effect of which, literally construed, was to narrow the conditions of the bond as required by the statute. Under such circumstances, the court held, in an action brought against the surety on the bond, that it should be construed and enforced as if it in fact contained the statutory conditions undiminished and unqualified. The question of whether a board of directors of a bank has the power, in the discharge of the discretionary duties of that office, to exact from a bank cashier as a part of the contract of employment, a bond conditioned more broadly than

a statutory requirement that a bond with certain specified conditions be taken, or whether such a bond, if given, may be enforced according to its terms, was not involved, and hence not decided. In *State, ex rel. v. Heim, supra*, a contract for a public improvement provided that the contractor's bond required by the board of commissioners should contain a certain condition not specified by the statute. The bond as executed in fact contained only the statutory conditions. In a suit brought by the board of commissioners against the surety on the bond, the plaintiff declared on a breach of such additional condition, not in fact contained in the bond. This court held that as the condition involved was not contained in the bond or required by the statute, it could not be read into the bond, and enforced as against a surety, in the absence of an allegation and proof that it had been omitted from the bond by mistake of the parties. It is evident that that case is not in conflict with the decision in the case at bar. *State, ex rel. v. Fletcher, supra*, involved a recognizance bond, executed by a defendant, conditioned primarily for his appearance at court for trial. We do not regard that case as controlling here.

As tending to support the original opinion, we call attention to the following in addition to the decisions cited therein: *City of St. Louis v. Von Phul* (1896), 133 Mo. 561, 34 S. W. 843, 54 Am. St. 695; *Hamilton v. Gambell* (1897), 31 Or. 328, 48 Pac. 433; *Knapp v. Swaney* (1885), 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; *Devers v. Howard* (1898), 144 Mo. 671, 46 S. W. 625; *City of Philadelphia v. Steward* (1900), 195 Pa. St. 309, 45 Atl. 1056; *Bunneman v. Wagner* (1888), 16 Or. 433, 18 Pac. 841, 8 Am. St. 306; *Portland v. Bituminous Paving Co.* (1898), 33 Or. 307, 52 Pac. 28, 72 Am.

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St. 713, 44 L. R. A. 527; *Trustees, etc. v. Rausch* (1890), 122 Ind. 167, 172, 23 N. E. 717; *Puget Sound State Bank v. Gallucci* (1914), 82 Wash. 445, 144 Pac. 698; *Dolese Bros. Co. v. Chaney* (1915), 145 Pac. (Okl.) 1119. 1 Elliott, Roads & Sts. (3d ed.) §646.

As to the second point urged, appellant does not controvert the statement contained in the original opinion to the effect that there is no con-

9. troversy respecting the facts, and that from them conflicting inferences can not reasonably be deduced. Neither does appellant call attention to any additional defense that it might make or to any additional fact that it might urge in its own behalf on a retrial. Under such circumstances, we believe that the court, as indicated in the original opinion, properly applied the sections mentioned, in order that the judgment below might be affirmed. *Southern R. Co. v. Howerton* (1914), 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; 1 Ency. Pl. and Pr. 608, 610. The petition for a rehearing is overruled.

NOTE.—Reported in 109 N. E. 237, 111 N. E. 19. As to liability of surety company as distinguished from that of individual sureties, see Ann. Cas. 1912 B 1087. As to right of one furnishing labor or material to sue on bond given by contractor to property owner, see Ann. Cas. 1916 A 754. See, also, under (1) 5 C. J. 985; 4 Cyc 91, 96; (2) 5 C. J. 913; 4 Cyc 47; (3) 25 Cyc 665; (4) 5 C. J. 916, 924; 4 Cyc 49; (5) 22 Cyc 62, 63; (6) 32 Cyc 306; (7) 37 Cyc 235; (8) 11 Cyc 484; (9) 4 C. J. 749; 3 Cyc 444.

HAMMOND SAVINGS AND TRUST COMPANY v. BONEY.

[No. 8,384. Filed January 8, 1915. Rehearing denied June 24, 1915.

Transfer denied March 17, 1916.]

1. **LANDLORD AND TENANT.—Rights of Tenant.—Knowledge of Prior Lease.**—The occupant holding over after the expiration of his term and claiming some new right in the premises by virtue of an alleged oral understanding had with the owner after actual and constructive knowledge that the latter had leased to another, could not successfully maintain such right against the lessee. p. 299.
2. **EVIDENCE.—Affidavits.—Conclusiveness.—Admissions.**—An affidavit filed by the occupant of premises in aid of a motion to dissolve a restraining order against him further holding possession, asserting that his right to occupy the premises after the expiration of the lease was extended to February 1, 1910, was binding upon him as an admission in a subsequent action for forcible entry and detainer. p. 299.
3. **FORCIBLE ENTRY AND DETAINER.—Statutes.—Construction.—“Or”.—“And”.**—The word “or” should be read as “and” in the first relative clause of §8083 Burns 1914, §5237 R. S. 1881, providing that “any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having the right to possession thereof; or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same against any person having the right to possession thereof, may be ousted from such premises”, etc. p. 303.
4. **FORCIBLE ENTRY AND DETAINER.—Statutory Provisions.—Scope.**—Only persons having right to possession of the lands involved come within the protection of the forcible entry and detainer statute (§8083 Burns 1914, §5237 R. S. 1881), and under its provisions, the possession can not be changed against the person who actually has it under a claim of right, without the intervention of legal procedure. p. 304.
5. **FORCIBLE ENTRY AND DETAINER.—What Constitutes.**—A forcible entry or a forcible holding is more than a mere trespass, and to constitute such entry or holding, possession must have been taken or kept either by actual violence or by such show of force as was reasonably calculated to intimidate the rightful owner. p. 305.
6. **LANDLORD AND TENANT.—Forcible Entry.—What Constitutes.—Force Required.**—While the act of a landlord and his new lessee, on the alleged termination of the lease and right to possession of an occupying subtenant, in entering the premises in the absence of the latter, by prying boards off a trapdoor in the floor over a cellar to which the landlord had access, did not in itself amount to a forcible entry as defined by §8083 Burns 1914, §5237 R. S. 1881, yet such method of entrance, coupled with the fact that it was for

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the purpose of obtaining possession as against one who was holding under a claim of right, and the further facts that they promptly proceeded to barricade the doors and placed on guard a special policeman bearing the indicia of authority, who protected the premises against reentry until arrested at the instance of the subtenant, who immediately instituted legal proceedings, constituted a forcible entry within the meaning of the statute. p. 306.

7. LANDLORD AND TENANT.—*Recovery of Possession.—Process of Law.*—The rule that a landlord, entitled to immediate possession through expiration of the term, may take such possession by force and will incur no civil liability except for excessive force, has no application to cases where such possession is obtained in violation of the forcible entry and detainer statute; and an entrance under circumstances amounting to a forcible entry, though made in reliance on the provision of a lease entitling the landlord to enter, take possession and expel the occupant without in any way being a trespasser, created a liability under §8083 Burns 1914, §5237 R. S. 1881, defining forcible entry and detainer. p. 310.

From Porter Superior Court; *Harry B. Tuthill*, Judge.

Action between Mathias Boney and the Hammond Savings and Trust Company. From a judgment for the former, the latter appeals. *Affirmed.*

W. J. Whinery, for appellant.

McMahon & Conroy and *McAler Bros.*, for appellee.

CALDWELL, P. J.—It is conceded by appellant that the only questions presented on this appeal are that the decision and finding of the court are not sustained by sufficient evidence, and are contrary to law. There is no great conflict in the evidence. The radical difference between the parties is respecting its legal effect. The facts are substantially as follows: On January 1, 1907, and at all other times mentioned in the record, Anton H. Tapper was the owner of a certain business block in the city of Hammond, consisting of three stories and a basement; on said day, Tapper, by an instrument in writing, leased the ground floor of said block to

The McAvoy Brewing Company of Chicago for a term of three years, ending January 1, 1910. In February, 1907, the brewing company, by parol, and with the consent of Tapper, sublet the room to appellee, who thereupon entered into possession, and used it in the business of operating a saloon for the retail of intoxicating liquors. The fixtures and furnishings were owned by the brewing company. The lease so executed to the brewing company contained the following provisions:

“At the expiration of this lease, or on failure to pay rent when same is due, or on failure to comply with any of the conditions of this lease, the same shall terminate at once, without notice, and the said Anton H. Tapper, his representatives and assigns may enter on and take possession of said premises, and expel the occupant thereof, without in any wise being a trespasser, and a failure of said Anton H. Tapper to take possession of said premises at the time aforesaid, shall not estop him from afterwards asserting said rights, and the occupation of said premises by the said tenant after the expiration of said lease, or the forfeiture thereof, shall give him no rights as tenant, but he may be expelled at any time without notice.”

At the time of the execution of the lease, Tapper endorsed on the back of it his signed consent that the room might be sublet at any time within the granted term. On July 8, 1909, Tapper executed to appellant an instrument in writing, by which he leased the room to appellant for a term of ten years, commencing January 1, 1910, to be used in conducting a banking and trust company business. This lease was properly executed and acknowledged before a notary public, and was duly recorded in the recorder's office of Lake County, on July 27, 1909. Prior to January 1, 1910, Tapper notified the brew-

ing company by letter that he expected the room to be surrendered at the expiration of the company's lease on January 1, 1910. Appellee apparently had knowledge that such notice had been given, and prior to said date negotiated with Tapper and the company with a view to leasing another room owned by the former, and on which the latter apparently had some claim. The question of the procuring of such other room by appellee remained in doubt for sometime, and resulted finally in its being leased to another party. Appellee insisted that he had made some sort of an arrangement by which he was to occupy the room in question after January 1, 1910. He claimed that when the brewing company sublet the room to him, its agent stated that he might occupy it indefinitely if the rent was paid. He had actual as well as constructive knowledge of the execution of the ten-year lease to appellant, but did not claim that any arrangement was made with appellant for the occupancy of the room by him after January 1. At the trial, appellee testified that Tapper in January, 1910, gave him permission to occupy the room after the first of that month. The brewing company refused to accept the installment of rent for January, and thereupon on two occasions, appellee tendered such installment to Tapper, who refused it. There was evidence that in January, Tapper, on several occasions, demanded that appellee vacate the room. Appellee's somewhat cloudy claim to the right to occupy the room is made rather more definite by an affidavit filed by him in this proceeding, in support of his motion to dissolve a temporary restraining order, hereinafter mentioned, wherein he stated in substance that after January 1, 1910, he was in possession of the room pursuant to an oral agreement made with the brewing company and a subsequent oral agreement

made with Tapper; that by the former he leased the room from the brewing company for three years, with the privilege of five "according to the terms of the lease made by and between the said Anton H. Tapper, the owner thereof, and the said McAvoy Brewing Company"; that having later ascertained that the lease to the brewing company was only for the term of three years, and consequently that the company did not have the power to sublet the room for a longer term, there was an agreement made between him and Tapper, by which they would arrange "as between themselves for the rent of the premises until the first day of February, 1910", being the time of the expiration of his county license to retail intoxicating liquor.

Before proceeding further with the statement of facts, it will be well to determine appellee's position relative to the room, and his right in the

1. premises after January 1, 1910. The lease to the brewing company was for the definite term of three years, terminating January 1, 1910, at which time it expired without notice. §8059 Burns 1914, §5213 R. S. 1881. The brewing company could not transfer to appellee any greater interest in the room than it held of Tapper, and hence appellee's term held of the company could not extend beyond January 1, 1910. In that month, when appellee apparently claims that he procured some new right in the premises by virtue of an oral understanding with Tapper, he had both actual and constructive knowledge of the lease executed by Tapper to appellant, and hence any such new right was subject to the lease last named, and could not be successfully maintained as against appellant. Moreover, by the affidavit filed in aid of the motion to dissolve the restraining order,
2. appellee asserted under oath that such new right, if any, extended only to February 1,

1910. Such assertion is binding on appellee as an admission in this proceeding. *Templer v. Lee* (1914), 55 Ind. App. 433, 103 N. E. 1090. It follows that at least after February 1, 1910, appellee's right to hold the room had terminated, and that at such time, if not before, a proper proceeding to oust him could have been successfully maintained. The evidence is not strong enough, however, to warrant us in holding that appellee was actuated by bad faith in endeavoring to hold possession of said room. No such proceeding was brought. On the contrary, continuing our statement of facts, on or about February 1, said brewing company removed the fixtures from said room, under a writ of replevin, leaving certain personal property belonging to appellee, consisting of barrels and kegs containing liquor, an assortment of bottles, chairs, linoleum, cigars, etc. In the early part of February, appellee was not regularly at his place of business. He was there a portion of each day, and always in the evening. There is some confusion in the record as to when his license expired. He states in the affidavit that it did not expire until February 1. At that time he had pending an application for a license to retail liquors, describing the room as the location. He had in the room, cigars, tobaccos, etc., for sale. He and his clerk each carried a key to the room. Tapper at all times retained possession of the basement under the room. In the forenoon of February 4, Tapper had seen appellee in the room, and later he and his attorney, with a Mr. Hammond, who was appellant's secretary, met by appointment, and proceeded to the room. Finding both the front and rear doors locked, and no one in the room, they proceeded into the basement through an outside door, and thence up an abandoned stairway, forcing off several boards from a trapdoor, and thus entered

the room. Tapper then made the statement that he now turned the room over to Hammond. They braced the front door, and Tapper, through the chief of police, procured as watchman for the room a Mr. Boles, who by reason of his size was popularly known as "Big Jess", and who sometimes served as a special policeman. Tapper and Hammond placed Boles in the room with a star displayed on his clothing, and directed him to admit no one except as directed by them. Tapper subsequently paid Boles for his services. Boles went on guard in the forenoon, and thereupon certain workmen, called by Hammond, proceeded to tear up the floor and Tapper removed some partitions, preparatory to rearranging the room for banking purposes. Tapper engaged a drayman to remove appellee's property and place it in storage. About two o'clock, appellee learned of the occurrences, and came to the room. Failing to gain admittance by the front door by reason of its being braced, he went to the rear door, where the drayman was loading his property. Appellee attempted to enter by the rear door, but was informed by Boles that he could not come in. On appellee's persisting, Boles, forcibly pushed him away from the door and prevented him from entering. Appellee then having consulted a lawyer, procured to be issued, on a charge of trespass made by him, what are called "John Doe warrants". In the meantime Boles had braced the back door also. Shortly thereafter, a constable bearing the warrants, and accompanied by appellee and several other persons, two of whom had revolvers in their possession, demanded admission at the rear door, for the purpose of serving the warrants. Boles refused to admit them. The outside parties then procured a gas pipe, and with it forced the door open against the resistance of Boles, who was

thereupon arrested and taken before a justice of the peace. Certain workmen who were at the time in the room, and who were under contract with appellant to do work in remodeling the room, escaped through a basement window, but were subsequently arrested. The workmen declined to return to their work until after a restraining order was issued in this case. The persons arrested have not been tried, but there was some evidence of an agreement that prosecution should await the event of this action. The arrests having been made, appellee took possession of the room, and caused his property to be returned to it. There was no evidence that appellee at the time this action was commenced was holding such possession by a display of force other than the moral effect of his presence in the building, and the fact that such arrests had been made. On February 8, appellant commenced this action. The complaint alleges the execution and recording of the lease under which it claims; the delivery of possession to it by Tapper; that it proposed to use the room for banking and trust company purposes; that it had entered into contracts aggregating several thousand dollars for the repair of the room, the beginning of work under such contracts, the interruption of such work, and the expulsion of the persons engaged thereat by appellee, by means of threats and arrests on alleged charges of trespass; appellee's intimidation of the workmen by lingering in and about the room; that appellee has no right, title or interest in or to the room, and that the arrests were made in bad faith. Prayer for a restraining order, and for a permanent injunction on a hearing. The court issued the restraining order as prayed for, and March 4, over appellee's verified motion to dissolve such restraining order, the court continued it until final hearing as a temporary

injunction. Afterwards the venue of the cause was changed to the Porter Superior Court, where a trial resulted in a judgment in favor of appellee.

As we have indicated, appellee, at the time when Tapper and appellant, through its said secretary, entered the room, and declared themselves to be thereby in possession of the same, was wrongfully holding over, at least in the sense that by a proper proceeding he could have been ousted. We do not understand that appellee combats the foregoing proposition. He seems to concede that under the case developed by the evidence, he was at most but a tenant at sufferance, with a possession that he could not have successfully maintained as against such a proper proceeding. He contends, however, that whatever possession Tapper and consequently appellant obtained was in violation of the forcible entry and detainer statute, and that under such statute, he was entitled to be restored to such possession; that appellant's possession was characterized as wrongful by reason of the manner in which it was obtained, and that consequently appellant can not defend such possession or protect itself in it by recourse to an equitable proceeding. In our judgment, if appellee's premise is sound, his conclusion is inevitable.

The forcible entry and detainer statute is as

3. follows: "Any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having right to possession thereof; or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same against any person having right to possession thereof—may be ousted from such premises, and the possession thereof restored to the person entitled to the same, and damages for retention recovered on complaint by him made, in the same

manner as provided in the case of tenants holding over". §8083 Burns 1914, §5237 R. S. 1881. The word "or" in the first relative clause of said statute should be read as "and". *O'Connell v. Gillespie* (1861), 17 Ind. 459; *Tibbetts v. O'Connell* (1879), 66 Ind. 171; *Burgett v. Bothwell* (1882), 86 Ind. 149. It will be observed that only persons "having right

to possession" of the lands involved come
4 within the protection of the statute. In discussing the scope of the meaning of the quoted phrase, Mitchell, J., in *Judy v. Citizen* (1885), 101 Ind. 18, arrives at the conclusion that "where one is in the actual peaceable possession of lands, under a claim of right, such possession of itself gives him, as against any person entering or seeking to enter by force upon a possession so had, the right to possession", and consequently that such a person comes within the protection of the forcible entry and detainer statute. It is also held by such decision that "Under this statute, the possession can not be changed against the person who actually has it, under claim of right, without the intervention of legal procedure".

In the case at bar, appellee was in the peaceable possession of the room up to February 4, under a claim of right, and the evidence is not sufficient to indicate that such claim of right rested in bad faith. It follows that the mere fact that Tapper owned the legal title to the room, or that the actual right to the possession, as it might be determined by a legal investigation, rested in him or appellant, did not, under the terms of the statute, justify a forcible invasion of appellee's possession. If there was such a forcible invasion, appellant as a participator in it, and as the beneficiary of its fruits, was in the wrong in the beginning of this action, and as a consequence, he could not prevail in this proceed-

ing. *Schwinn v. Perkins* (1910), 79 N. J. L. 515, 78 Atl. 19, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223; *Peele v. State* (1903), 161 Ind. 378, 68 N. E. 682. The broad language used in *Judy v. Citizen*, *supra*, that "Under this statute, the possession can not be changed against the person who actually has it, under claim of right, without the intervention of legal procedure" must be understood as applying to a case where such person insists on maintaining the possession, and in order to deprive him of it, recourse either to force or to a proper legal procedure is necessary. It would seem apparent that where the landowner is wrongfully held out of possession by one without right in the premises, he may, when the opportunity presents itself, gain a possession in fact peaceable and by peaceable means, and that the necessity for recourse to legal procedure would exist only where peaceable means fail and force would otherwise be necessary. *Scott v. Willis* (1890), 122 Ind. 1, 23 N. E. 786.

The first question for determination, therefore, is whether in the case at bar, there was a forcible invasion of appellee's right, within the mean-

5. ing of the statute, and first as to the manner of entering said room while appellee was temporarily absent. "A forcible entry or a forcible holding means more than a mere trespass. The force must be actual. The possession must be shown to have been taken or kept either by actual violence, or by such a show of force as was reasonably calculated to intimidate the rightful owner." *Archey v. Knight* (1878), 61 Ind. 311. See, also, *Gipe v. Cummins* (1889), 116 Ind. 511, 19 N. E. 466. "There must be some *actual violence*, or some proceeding, as a *large assembly of persons*, calculated to create alarm, if not terror, in ordinary minds, though

it is not necessary that there should be any assault or battery." *Boxley v. Collins* (1837), 4 Blackf. 320. "It must be accompanied by some circumstance of terror or violence to the person unless the entry is riotous or tumultuous, and endangers the public peace." *Smith v. Reeder* (1892), 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172. "There must be something of personal violence or a tendency to, or threats of personal violence, unless the entry or detainer is riotous." *Willard v. Warren* (1837), 17 Wend. (N. Y.) 257.

In the case at bar, the persons involved proceeded quietly to the room, and ascertaining or knowing that appellee was absent, and that the doors
6. were locked, they passed through a door into the basement, of which Tapper had possession, and thence into the room by forcing some boards that constituted a part of a trapdoor. There was no display of force or of weapons, no public clamor, and no force in fact, save that which was applied to the boards. Such force constituted no more than a mere trespass. If such an entry, considered alone, should be held to be a forcible entry, within the meaning of the statute, it would follow that the unlocking of a door, or the mere turning of a latch, in order to gain entrance to a building, or the unlocking of a gate, or the opening of a fence in order to gain an entrance onto lands, is also a forcible entry, since the illustrative cases differ from the case presented only respecting the amount and kind of force used. Within the meaning of the statute, an act, to be forcible, must be such as does, or that reasonably may be expected to act on the person, or it must be so tumultuous in its nature as to constitute, or to have a tendency to a breach of the peace. We hold that the manner of entry was not forcible within the meaning of the statute. We next turn

our attention to the proposition of whether such an entry amounted to a completed act, and being peaceable in nature, whether thereby a case is presented of one entitled to possession who has peaceably taken it, or whether it, with subsequent occurrences, constituted but one transaction, and that the whole must be looked to in order that any part may be characterized. Appellee's prior possession being peaceable, is presumed to have been rightful. Cooley, Torts (2d ed.) 383. Although appellee was at the time temporarily absent, and, therefore, not in the personal occupancy of the room, nevertheless his presumed rightful possession continued. It is also true that personal occupancy as attained by appellant, did not necessarily amount to possession. *Schwinn v. Perkins*, *supra*. If appellant's rights and liabilities here must be measured by the nature of the mere act of entering the room, and disassociated from the subsequent events, the same result would follow in case appellee had merely been standing on the sidewalk outside the room, or if he had actually been in the room, when Tapper and appellant entered, even had they entered through an open door with the intention of depriving appellee of possession. A surreptitious entry against a person in peaceable possession, who has no intention of relinquishing it, has a natural tendency to provoke a breach of the peace, as soon as such person acquires knowledge of the facts. Such a breach of the peace so caused, and following rapidly on the heels of the act of entering, or the transaction of it being quelled by a display of force can not be separated from the provoking cause, and is among the evils intended to be remedied by the forcible entry and detainer statute. *Judy v. Citizen*, *supra*; *McIntyre v. Murphy* (1908), 153 Mich. 342, 116 N. W. 1003, 15 Ann. Cas. 802. Doubtless where the

lawful owner of a building enters it under a claim of right in the absence of the person rightfully in the possession of it, and thereupon bars the doors, stations guards, etc., and on the return of such other person, refuses him entrance, and such other person expressly or impliedly acquiesces in the possession of such owner, such possession would ripen into such a lawful and peaceable one as could rightfully be defended. But "if a person enter upon land in the actual and peaceable occupation of another, the possession which he acquires can not be deemed to be peaceable during the time when it has to be protected by firearms, or other demonstrations of force, against an attempted or threatened reëntry of the former occupant, who manifests to the intruder, by his words or acts, that he intends to reënter at the earliest moment when he can do so without violence, and who is only prevented from entering by an exhibition of firearms, or threats and menaces. Such a possession can not justly be said to be 'peaceable' in any sense, and certainly not in the sense of the statute." *Bowers v. Cherokee Bob* (1873), 45 Cal. 495. See, also, *Wilson v. Campbell* (1907), 75 Kan. 159, 88 Pac. 548, 8 L. R. A. (N. S.) 426, 121 Am. St. 366, note, 384, 12 Ann. Cas. 766. "To constitute a forcible entry within the meaning of the statute, it is not necessary that the actual invasion of the premises should at the very moment be attended by the circumstances requisite to give it the character of a forcible entry, or be accompanied by threats, actual force or violence, or any conduct which would constitute a breach of the peace; but if the entry be obtained by stealth or strategem, or without real violence, and the party entering evinces his purpose in having entered to have been the forcible expulsion of the party in possession, and it is followed up by actual expulsion

by means of personal threats or violence, or superior force, it will amount to a forcible entry." *Seitz v. Miles* (1868), 16 Mich. 455. See, also, *McIntyre v. Murphy*, *supra*; *Mason v. Hawes* (1884), 52 Conn. 12, 52 Am. Rep. 552; 2 Tiffany, Landlord and Tenant §216. In the following the transaction of entering is treated as including both the act of attaining a disputed possession by stealth, and the subsequent act of maintaining it by force; *Schwinn v. Perkins*, *supra*; *Wilson v. Campbell*, *supra*; *Page v. Dwight* (1897), 170 Mass. 29, 48 N. E. 850, 39 L; R. A. 418; *Bell v. Longworth* (1855), 6 Ind. 273. *Eville v. Conwell* (1828), 2 Blackf. 133, 18 Am. Dec. 138.

Here the entry was made without the knowledge or consent of appellee, and while he was temporarily absent from the room. Had he been present in the room, and had he promptly offered resistance to the invaders as they were making the entry, or as soon as they gained occupancy, and had they overcome and expelled him from the room by violence, it could not consistently be maintained that such an entry was peaceable. The conduct of the invaders indicated that they expected a contest. They proceeded promptly to barricade one door, and placed on guard at the other a watchman bearing the indicia of legal authority. As soon as appellee learned that Tapper and others were occupying the room, he attempted to recover or regain whatever actual possession he had lost. He was promptly and forcibly expelled, as testified to by Boles. The entire transaction we hold to have been a forcible entry within the meaning of the statute. It was reasonably calculated to provoke an encounter, or to lead to a breach of the peace that might have been serious in its consequences. It matters not whether appellee was justified in his subsequent conduct.

If, in procuring the John Doe warrants to be issued, and the persons to be arrested, on a charge of trespass, he did not pursue the proper legal remedy, or if he acted in bad faith, so as to place himself in conflict with the principle announced by *Tibbetts v. O'Connell*, *supra*, none of which do we decide (see, *Fults v. Monro* [1911], 202 N. Y. 34, 95 N. E. 23, 37 L. R. A. [N. S.] 600, Ann. Cas. 1912 D 870), still his conduct, if wrongful, did not justify appellant in its prior act of gaining possession of the room in violation of the statute. Appellant, being in the wrong, can not be protected in his possession so gained, or have such possession restored to him by an appeal to equity. Such cases as *Page v. Dwight*, *supra*, and *Smith v. Reeder*, *supra*, in the final conclusion reached, are apparently not in harmony with the views of this court. These cases, however, are decided under statutes that differ in their provisions from our statute, and it is possible that the conflict between them, and our views is only apparent rather than real.

Appellant's brief includes a number of quotations and citations of authority, of which the following from the 24 Cyc 1394, is a fair sample: "The

7. rule supported apparently by the weight of authority is that where the landlord has become entitled to immediate possession of the premises through the expiration of the term, he may take such possession by force, without incurring civil liability, in case no more force than is reasonably necessary is employed." The subject-matter of such quotation is liability to an action for trespass, assault and battery and the like, rather than liability under the forcible entry and detainer statutes. That such is the case appears in that immediately following said quotation is the language: "and although he may be subject to punish-

ment criminally under statutes relating to forcible entry and detainer." By the common law, the owner of lands in the actual possession of another person was permitted to oust such other person by force, and without recourse to any legal procedure, if such owner was in fact entitled to the possession of such lands. Experience taught, however, that many evils grew out of such permissible practice. Thereby a landlord became his own judge as to whether under a given state of facts he was entitled to possession, and having pronounced judgment in his own favor, he was authorized to execute it by force, and in so doing he incurred no peril, in case his judgment on investigation turned out to be correct. The disputes respecting the right to possession led to commotion, turmoil and breaches of the peace, and to correct these evils the forcible entry and detainer statutes of England and of the various states were enacted. *Judy v. Citizen, supra*. Where a person, in violation of the terms of these statutes is forcibly ousted from the possession of real estate, or where under the terms of some of them such possession is forcibly detained from him, by recourse to the remedy afforded by such statutes, the possession of such real estate may be restored to him. The remedy is purely statutory, and, as is usual, if not universal in such cases, the person may avail himself of the statutory remedy only by moving in harmony with the procedure outlined by it. "A person wrongfully in possession, and dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it is not entitled to maintain any other action than is afforded for a forcible entry under the code. He was not entitled to maintain, under such circumstances, any action whatever under the common law, and the common-law rule has only been changed in this state to the

extent, and no further, that the code affords him a remedy under its provisions referred to which he otherwise would not have." *Walker v. Chanslor* (1908), 153 Cal. 118, 94 Pac. 606, 126 Am. St. 61, 17 L. R. A. (N. S.) 455. The distinction made by the supreme court of California in the case last cited is recognized in *Moyer v. Gordon* (1888), 113 Ind. 282, 287, 14 N. E. 476. See, also, *Vinson v. Flynn* (1897), 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415. It follows that where the landlord is in fact entitled to possession, and he dispossesses the tenant under circumstances that give the tenant a remedy under the forcible entry and detainer statute, if the latter elects not to pursue such remedy, but rather sues in tort, as for the trespass, assault and battery, or the like, the landlord is liable in such form of action only for excess of force. In the following cases, several of which, with others of a like nature are cited in appellant's brief, while many sound principles are announced and discussed, in each instance, the action is for trespass, assault and battery, or of a like nature, rather than under the statute, and as a consequence, the point decided is not applicable here. *Vinson v. Flynn, supra*; *Smith v. Detroit, etc., Assn.* (1897), 115 Mich. 340, 73 N. W. 395, 69 Am. St. 575, 39 L. R. A. 410; *Allen v. Keily* (1891), 17 R. I. 731, 24 Atl. 776, 33 Am. St. 905, 16 L. R. A. 798; *Walker v. Chanslor, supra*; *Mussey v. Scott* (1859), 32 Vt. 82.

Appellant, in justification of the entry in the case at bar, bases an argument on the provision of the lease under which appellee held, as hereinbefore quoted, to the effect that at the expiration of the term of the lease, Tapper, his representatives and assigns, might enter upon and take possession of the premises, and expel the occupant thereof, without in any manner being trespassers. Appellant sup-

ports such argument by citing *Fabry v. Bryan* (1875), 80 Ill. 182, which follows earlier Illinois cases, and is in turn followed by *Goshen v. People* (1896), 22 Colo. 270, 44 Pac. 503; and *Howe v. Frith* (1908), 43 Colo. 75, 95 Pac. 603, 127 Am. St. 79, 17 L. R. A. (N. S.) 672, 15 Ann. Cas. 1069. While we do not place any particular stress on the distinctions, it may be observed that in each of such cases the lease involved contained the further provision that such entry might be "with or without process of law", and that in so entering the lessor was authorized "to use such force as may be necessary in so doing", and that the nature of the action was other than as provided by the forcible entry and detainer statute. In any event we should not be inclined to follow such cases, and give them the stamp of our approval. Their soundness is doubted by 2 *Tiffany, Landlord and Tenant* 1505, 1506. They seem also to be in conflict with the following: *Spencer v. Commercial Co.* (1902), 30 Wash. 520, 71 Pac. 53; *McClelland v. Gaston* (1898), 18 Wash. 472, 51 Pac. 1062; *Kerr v. O'Keefe* (1903), 138 Cal. 415, 71 Pac. 447; *Bixby v. Casino Co.* (1895), 14 Misc. 346, 35 N. Y. Supp. 677.

Respecting such a provision, the following language is used in *Spencer v. Commercial Co.*, *supra*: "If clauses of this kind in a lease may be summarily enforced by the parties thereto by force, then the statutes of the state defining unlawful detainer, and providing a remedy by which a landlord may obtain possession may be entirely abrogated by contracts, which permit landlords to take the law into their own hands."

We find no error in the record for which the judgment should be reversed. The judgment is affirmed.

Hottel, C. J., Felt, Powers and Shea, JJ., concur; Ibach, J., not participating.

NOTE.—Reported in 107 N. E. 480. As to what is unlawful detainer see 120 Am. St. 33. As to right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who forcibly dispossessed him, see 8 L. R. A. (N. S.) 426; 32 L. R. A. (N. S.) 51. As to threats and display of force without actual force as constituting forcible entry, see 15 Ann. Cas. 804. As to right of tenant to maintain forcible entry and detainer against landlord for forcible ejectment after termination of lease, see 12 Ann. Cas. 767. As to keeping out of possession person entitled thereto, by fear of personal violence, after peaceable entry, as giving right of action, see Ann. Cas. 1912 D 875. See, also, under (1) 24 Cyc 1009, 1014; (2) 16 Cyc 1048, 1050; (3) 36 Cyc 1123; (4) 19 Cyc 1124, 1128; (5) 19 Cyc 1134, 1135; (6) 19 Cyc 1135; (7) 19 Cyc 1141, 1142.

SOUTHERN RAILWAY COMPANY ET AL. v. WEIDENBRENNER.

[No. 8,302. Filed October 29, 1915. Rehearing denied February 1, 1916. Transfer denied March 17, 1916.]

1. APPEAL. — *Review. — Refusal of Instructions.* — Although a requested instruction stated the law correctly, its refusal was not reversible error in view of another instruction given which fully covered the subject. pp. 318, 321.
2. WATERS AND WATERCOURSES. — *Obstruction. — Flooding Lands. — Liability of Railroad.* — A railroad company is under a continuing duty to maintain its bridges and abutments so as to do no injury or damage to neighboring property, and a failure in that regard resulting in the obstruction of the natural flow of the water constitutes actionable negligence. p. 318.
3. EVIDENCE. — *Presumption. — Repair of Bridge.* — There is no legal presumption that a railroad bridge was skilfully and carefully repaired, and that the company did nothing unlawful; but such questions are matters of proof. p. 319.
4. APPEAL. — *Review. — Harmless Error. — Refusal of Instructions.* — The refusal of an instruction giving a substantially correct definition of a watercourse was harmless, where there was no dispute about the stream involved being a watercourse. p. 319.
5. APPEAL. — *Review. — Contradictory Instructions. — Damages. — Elements.* — A requested instruction that if the rainfall of itself produced the injuries complained of the verdict should be for defendants, even though the alleged obstructions in the stream existed and caused the water to back up over plaintiff's lands deeper and caused it to remain longer than it would have without the existence of such obstructions, was contradictory within itself and properly refused,

since the damage could not have been wholly produced by rainfall if other causes caused the water to remain longer on plaintiff's land, and the damage would be increased by lengthening the time the water stood on the land. p. 320.

6. **WATERS AND WATERCOURSES.—Obstruction.—Flooding Lands.—Liability.—Unusual Conditions.**—A railroad company is not relieved from liability for negligently maintaining a bridge so as to obstruct the flow of water and cause it to back up over nearby lands, on the ground that there was an unusual rainfall, since under §5195 Burns 1914, §3903 R. S. 1881, it is the duty of the company, after building its bridge across a stream, to restore the watercourse to its former state. p. 321.
7. **APPEAL.—Review.—Instructions.—Submitting Interrogatories to Jury.**—An instruction advising the jury that interrogatories would be submitted and that the jury might first determine its general verdict, or, if preferable, it could answer the interrogatories first, or that it could consider the verdict and interrogatories at the same time, etc., was harmless in view of the record, although under §562 Burns 1914, §536 R. S. 1881, there is no necessity for answering interrogatories where no general verdict is reached. p. 321.
8. **TRIAL.—Interrogatories to Jury.**—The practice of submitting a large number of interrogatories to the jury, containing many inconsequential questions calculated to have no other effect than to confuse and mystify the jury, should not be permitted. p. 323.
9. **WATERS AND WATERCOURSES.—Obstruction.—Railroad Bridges.**—Railroad companies are guilty of actionable negligence if they construct and maintain their bridges or embankments or trestles in such manner as to obstruct a watercourse, and are also liable if they obstruct a waterway with stones, piling or debris of any kind, or if they negligently permit drift to accumulate about their bridges or piling to the injury of adjoining property. p. 323.
10. **WATERS AND WATERCOURSES.—Railroad Bridges.—Construction.**—In the construction of a bridge across a stream, it is the duty of a railroad company to exercise at least a reasonable degree of care and prudence, taking into consideration the laws of hydraulics, the natural formation of the country, the character of the stream and its history, so as to guard against injuries which may reasonably be anticipated. p. 324.
11. **NEGLIGENCE.—Pleading.—Proof.**—If several acts are charged as combining to bring about an injury, all of such acts must be proven in order to sustain a recovery. p. 324.

From Dubois Circuit Court; *Lucius C. Embree*, Special Judge.

Action by Joseph Weidenbrenner against the Southern Railway Company and another. From a

judgment for plaintiff, the defendants appeal. *Affirmed.*

Alex P. Humphrey, Edward P. Humphrey, John D. Welman, Richard M. Milburn, and Thomas Duncan, for appellants.

Horace M. Kean, Harry W. Carpenter and Robert W. Armstrong, for appellee.

SHEA, C. J.—This action was brought by appellee against appellants to recover damages to growing crops and real estate, occasioned by an overflow of his lands alleged to have been caused by certain obstructions in the Patoka River which were either placed therein or permitted to accumulate by the acts of appellants. A trial of the issues formed by an answer in general denial to appellee's complaint resulted in a verdict and judgment for appellee for \$700. It is assigned and argued by appellants that the court erred in overruling their motions for judgment on the facts found in answer to interrogatories notwithstanding the general verdict, and for a new trial.

Appellee in his complaint charges, in substance, that in July, 1909, he was the owner of 82 acres of land in Dubois County, Indiana, upon which he had been growing a crop of corn of the value of \$2,000; that adjacent to the land there was a public ditch which flowed in a southerly direction, and discharged its water into Patoka River; that Patoka River is a stream which at times overflows its banks in rainy seasons, and at such times requires a much wider waterway than at other seasons of the year, and at the same time and prior thereto, appellant Southern Railway Company of Indiana, a corporation organized under the laws of this State was the owner, and appellant Southern Railway Company, a corporation organized under the laws

of Virginia, was the lessee, of a line of railway extending through Pike and Dubois counties in the State of Indiana, which the last-named appellant operated and maintained; that in the line of railway there was a bridge across the Patoka River known as bridge 112, which was 118 feet long; that said bridge was so negligently constructed and maintained that it was shorter than the width of the river; that it constricted the channel and obstructed the flow of the waters, and beneath same, in the channel of the river, there were pilings which stood 6 feet above the river bed and caught and held drift and debris which obstructed the passage of such waters; that appellant Southern Railway Company, with the knowledge and consent of its coappellant had filled with earth certain openings in its roadbed, known as trestles 109, 110 and 111 which had spanned waterways, and whereby, in time of overflow, the waters of the river had theretofore flowed therefrom, and had obstructed the river by casting large quantities of stone and earth therein, maintaining its roadbed; that upon a switch of its railroad known as the Hartwell switch, appellant, Southern Railway Company, with the knowledge and consent of its coappellant, had repaired a bridge over the river by driving pilings within the stream in such negligent manner as to cause large quantities of drift and debris to accumulate and obstruct the stream, and the flow of the waters thereof, and appellee charges that, by reason of these acts, the waters of the Patoka River, when they overflowed its banks in July, 1909, were caused to back up in said ditch and overflow his lands and destroy the crop of corn thereon.

Under the motion for a new trial, it is urged that the court erred in giving and refusing to give certain instructions. In order that a discussion of the

errors assigned thereon will not reach undue length, we have grouped the instructions which seem to be based on the same theory, and we state our conclusions with respect to them in such form.

Instruction No. 10 tendered by appellants and refused by the court states the law correctly, but is covered by the court's instruction No. 2,

1. so that no error can be predicated upon the refusal to give said instruction. It is argued that the court erred in refusing to give
2. instructions Nos. 2, 20 and 32 tendered by appellants. These instructions are based on the theory that appellants had a right to build their railroad grades and bridges in such manner as suited their convenience, provided it was done lawfully and prudently. These instructions, we insist do not fully state the law. They minimize the fact that the duty to maintain the bridges and structures so as to do no injury or damage to neighboring property is a continuing one, and must be lawfully and prudently discharged. If there was a failure in this regard, appellants would be guilty of actionable negligence. If the piers and abutments were so constructed as to cause drift to accumulate, or if broken stone, sand and other debris were thrown into said stream, obstructing the natural flow of the water, all of which caused injury and damage to appellee, appellants would be liable and must respond in damages, if any be proved. The case was tried upon this theory, and as we think, rightly so. Therefore no error was committed in refusing to give these instructions. The law is correctly stated in instruction No. 1 tendered by appellants and given by the court. *Baltimore, etc., R. Co. v. Quillen* (1904), 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. 183; *Maxwell v. Shirts* (1901), 27 Ind. App. 529, 61 N. E. 754, 87 Am. St. 268; *American Plate Glass Co. v.*

Nicoson (1905), 34 Ind. App. 643, 73 N. E. 625; *Cleveland, etc., R. Co. v. Kline* (1902), 29 Ind. App. 390, 63 N. E. 483. In some jurisdictions the courts have gone much further, and hold that, if private property is in fact damaged or depreciated in value by the construction of a railroad near the same, the fact that the railroad and track were constructed with the highest degree of skill and care, and that its engines and trains were carefully and skilfully operated, would be no defense. *Schier v. Cane Belt R. Co.* (1907), 45 Tex. Civ. App. 295, 100 S. W. 360.

Instruction No. 5 tendered by appellants and refused by the court contains, among other things, this language: "The legal presumption is

3. that the bridge was skilfully and carefully repaired, and that the defendants did nothing unlawful." Appellants cite no authority, and after diligent search we are unable to find any to sustain this novel proposition. We are not convinced that engineers, carpenters and bridge workers are possessed of such a degree of infallibility as to create any presumption with respect to their work. In the judgment of this court this is a matter of proof. This instruction was therefore rightly refused.

Instruction No. 18 tendered by appellants and refused reads as follows: "The plaintiff charges that the defendants caused the obstruction

4. of certain watercourses that crossed the bed of the railroad track within about a mile east of bridge No. 112. A watercourse in its legal sense consists of a bed, banks and water, a living stream confined to a channel. A watercourse need not be shown to flow continuously. Its channel may sometimes be dry; but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water. A

channel made by mere surface water resulting from rain and snow is not a watercourse, unless there is ordinarily and most frequently a moving body of water flowing through it." This statement of the law is substantially correct, but inasmuch as there was no dispute about the river being a watercourse, the refusal to give such instruction was harmless.

Instruction No. 34 tendered by appellants and refused by the court reads as follows: "If you find

from the evidence that the rainfall that fell

5. in July, 1909, did of itself produce the injuries complained of in this action your verdict should be for the defendants, even though you find from the evidence that any or all of the obstructions mentioned in the complaint then existed and that such obstructions caused the water of Patoka River to back up over the plaintiff's said lands deeper than it would have been without such obstructions in said river, and caused said back water to remain on said lands a longer time than it would have remained without the existence of such obstruction or obstructions." This instruction is contradictory within itself. In the first instance, it states that "If you find from the evidence that the rainfall that fell in July, 1909, did of itself produce the injuries complained of in this action your verdict should be for the defendants." The latter part of the instruction states, "even though you find from the evidence that any or all of the obstructions mentioned in the complaint then existed and that such obstructions caused the water of Patoka River to back up over the plaintiff's lands deeper than it would have been without such obstructions in said river, and caused said back water to remain on said lands a longer time than it would have remained without the existence of such obstruction or obstruc-

tions." It is a matter of common knowledge that the longer overflowing water stands on growing crops, the greater the injury. Therefore, if the obstructions in the river caused the water to remain on appellee's land for a longer time than it would otherwise have remained, and thus caused additional injury, the rainfall could not have produced all of the damage complained of. The law upon this point is correctly stated in instruction No. 13 tendered by appellants and given by the court.

The theory that appellants could maintain obstructions in a watercourse which caused the water to "back up" over nearby lands, caus-

6. ing injury, and not be required to respond in damages is erroneous, even though there was an unusual rainfall. *Todd v. Badger* (1893), 134 Ind. 204, 33 N. E. 963; 3 *Shearman & Redfield, Negligence* (6th ed.) §733, note 39; *Alabama Lumber Co. v. Keel* (1899), 125 Ala. 603, 28 South. 204, 82 Am. St. 265. After building the road across the stream, it was the duty of appellants to restore such watercourse to its former state. §5195 Burns 1908, §3903 R. S. 1881. Instruction No. 25 tendered by appellants and given by the court is a correct statement of the law upon this point. No error was committed in refusing to give instruction

1. No. 26, as the principle therein involved is fully covered in other instructions given by the court.

Instruction No. 6 given by the court on its own motion presents a more serious question. It reads as follows: "Interrogatories will be sub-

7. mitted to you, and you are directed to answer each one of them, when you return a general verdict. When you go to the jury room and enter upon the consideration of this case, there is no rule

of law that limits you to any special order of proceeding. You may first take up and determine the question as to what shall be your general verdict or if you prefer, you may first take up and answer the interrogatories. If you choose, you are at liberty to consider the verdict and interrogatories at the same time. In answering the interrogatories, you should be governed solely by the evidence and each answer should be the truth as you find the truth to be from the evidence. The answers must be written underneath the respective questions and each answer must be signed by your foreman." The statute which authorizes the submission of interrogatories to a jury reads as follows: "That in all actions hereafter tried by a jury, the jury shall render a general verdict, but in all cases when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause, and this shall be the only form of verdict submitted to or rendered by the jury in the cause. * * * These interrogatories are to be recorded with the verdict." §562 Burns 1914, §536 R. S. 1881. If no general verdict is reached, there is no necessity for answering the interrogatories submitted. In view of some expressions by the Supreme Court in the late case of *Wabash R. Co. v. Gretzinger* (1914), 182 Ind. 155, 104 N. E. 69, a majority of this court is constrained to hold this instruction harmless. The writer of this opinion believes this instruction was both erroneous and harmful. We are of the opinion however, that the manner of submission of interrogatories to the jury should be clearly and definitely defined so that the practice in the trial courts shall be uniform. This court is obliged to follow the decisions of the

Supreme Court. See *Summers v. Tarney* (1890), 123 Ind. 560, 564, 575, 24 N. E. 678. In

8. this case 175 interrogatories were submitted to the jury. This court condemns this practice. Innumerable inconsequential questions are submitted which could have no other effect than to confuse and mystify the jury, and should not have been permitted by the trial court. However, we do not feel that this cause should be reversed for this reason. §§350, 407, 700 Burns 1914, §§345, 398, 658 R. S. 1881.

We shall state the law as we believe it to be in a general way, as applicable to the numerous other errors discussed, as a discussion of each ques-

9. tion presented in appellants' able brief would necessitate much repetition and unnecessarily lengthen this opinion. Railroad companies have no authority to construct and maintain their bridges or embankments or trestles or any other structure along their right of way in such manner as to obstruct a watercourse, and if they are guilty of any negligence in so doing, by which another is injured, they are liable, if the injured party is guilty of no negligence, however prudently they may be constructed from their viewpoint. Railroads become wrongdoers when they obstruct a waterway with stones, piling or debris of any kind, also if drift is negligently permitted to accumulate about their bridges or piling to the injury of adjoining property. They must so use their property as to in no manner cause injury and damage to neighboring property, and, if injury and damage results from the obstruction of a watercourse by any structure, the wrongdoer must respond in damages to the injured party. It was the duty of appellants to remove the accumulated drift in the stream. 3 Shearman & Redfield, Negligence (6th ed.) §735 and cases cited; *Southern*

R. Co. v. Friedley (1913), 52 Ind. App. 192, 100 N. E. 481; *Graham v. Chicago, etc., R. Co.* (1906), 39 Ind. App. 294, 77 N. E. 57, 1055; 40 Cyc 573; §5195 Burns 1908, *supra*; *Cleveland, etc., R. Co. v. Wishart* (1903), 161 Ind. 208, 67 N. E. 993.

In constructing embankments, bridges, culverts and other necessary works or structures beside or across a stream, it is the duty of the railroad

10. company, while employing engineers of at least ordinary competence and skill, to exercise at least a reasonable degree of care and prudence, taking into account the laws of hydraulics, the natural formation of the country, the character of the stream and its history to the extent of learning its probable behavior under any conditions which experience has shown are likely to occur, so as to guard against injuries which may reasonably be anticipated in the usual state of the stream, and also in unusual floods and freshets of a kind which may be fairly expected. The jury was fully instructed upon this principle.

If several acts are charged as combining to bring about the injury, then and in that case all of said acts must be proven in order to sustain a

11. verdict and judgment. *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613, 40 N. E. 62; *Merica v. Fort Wayne, etc., Traction Co.* (1912), 49 Ind. App. 288, 97 N. E. 192. Appellants earnestly insist that the complaint charges a combination of acts concurrently caused the injuries complained of; that there was a failure of proof of them, therefore there can be no recovery in this case. We do not think the complaint can be fairly so construed.

A careful examination of the instructions given by the court discloses that the jury was fully instructed upon all the vital issues involved, and no com-

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plaint can be made of the instructions except as herein pointed out. Judgment affirmed.

NOTE.—Reported in 109 N. E. 926. As to one's right to accelerate or diminish, by means of dams or bridges, flow of water from one's own land to that of another, see 85 Am. St. 708. As to liability of railroad company for obstruction of waters of stream by construction of railroad bridge, see 59 L. R. A. 863. As to liability of a railroad company for interference with watercourses by construction of road on land acquired for right of way, see 19 Ann. Cas. 336. See, also, under (1) 38 Cyc 1711; (2) 33 Cyc 357; 40 Cyc 573, 574; (3) 16 Cyc 1051; (4) 4 C. J. 1048; (5) 38 Cyc 1604; (6) 33 Cyc 357; (8) 38 Cyc 1910; (9) 33 Cyc 357; 40 Cyc 573; (10) 33 Cyc 357; 40 Cyc 574; (11) 29 Cyc 587.

MAST v. BORNEMAN & SONS.

[No. 8,957. Filed March 17, 1916.]

1. MASTER AND SERVANT.—*Injuries to Third Persons.—Liability.*—An employer is liable for injuries wilfully or carelessly inflicted by an employe while in the performance of his duties, whether the particular act complained of was authorized by the employer or not. p. 328.
2. MASTER AND SERVANT.—*Injuries to Third Persons.—Action.—Complaint.* — In an action against the proprietor of a store for injuries caused by the negligence of defendant's clerk, a complaint alleging that plaintiff purchased a hammer from defendant which was defective in that the metal was too soft and would slough and break off; that he returned the hammer and pointed out the defects to defendant's clerk who examined its condition and promised to give a good hammer in exchange for it; that, while plaintiff was waiting for the exchange to be made, the clerk carelessly and negligently struck the hammer a violent and heavy blow with a larger hammer, thereby causing a flake of steel from one of the hammers to slough off and fly into plaintiff's eye; that the hammer was so obviously defective that no test was necessary; and that such clerk knew or by the exercise of ordinary care should have known that the ordinary, probable and natural consequences of striking the two hammers together with force and violence would be to chip off or break flakes or particles of metal and set them violently in motion; was sufficient as against objection on demurrer to show that the flake of steel which caused the injury came from the defective hammer when struck by the testing hammer. p. 329.
3. MASTER AND SERVANT.—*Injuries to Third Person.—Liability.*—An injury inflicted on plaintiff while in defendant's store to exchange a defective hammer for a good one, caused by the act of defendant's

clerk in striking the hammer a heavy blow with a large hammer which caused a piece of steel to fly from the defective hammer and strike plaintiff's eye, can not be deemed a mere accidental injury, in view of the showing that plaintiff had pointed out the defect as being a condition of the steel that caused flakes of steel to slough when the hammer was in use, and that such defect was so obvious that no test was necessary, but was an act of negligence for which defendant was liable, since such clerk had cause to anticipate that as a result of his act a particle of steel might fly from such hammer and cause injury to one standing in close proximity. p. 329.

4. NEGLIGENCE.—*Anticipating Consequences.*—While in every case of negligence it must appear that the injury described was caused by the negligent act of the party charged, it is not necessary that the precise consequences of the negligent act which did occur should have been foreseen by him. p. 329.

From Elkhart Superior Court; *James L. Harman*, Judge.

Action by Samuel E. Mast against Borneman & Sons. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Orrin M. Conley, *Charles E. Frank* and *J. Raymond Conley*, for appellant.

Perry L. Turner, for appellee.

IBACH, C. J.—The complaint in this case is unusually long. The material averments are in substance the following: Appellee conducted a retail hardware store, and appellant, a carpenter, purchased of appellee a clawhammer, with the agreement that it might be returned if it did not prove satisfactory. The hammer was found to be defective and unsatisfactory in this, "the metal in the claw of said hammer was too soft and would slough off and break off and yield and bend out in pulling nails", etc. On September 23, 1913, the day appellant received his injury, he returned with the hammer to appellee's store, and then "pointed out to one of its clerks the broken, rough, bent and serrated condition of the claws of said hammer; said clerk * * * then and there acting within the scope of his authority

and while in the performance of his duties * * * took said hammer * * * observed and examined the defective condition of said clawhammer and then informed plaintiff that he would give him a good hammer in exchange for it. While he was waiting for the exchange to be made, the clerk without giving plaintiff any notice of his intention to test the defective hammer and without giving him any opportunity to step out of danger, carelessly and negligently struck the defective hammer a violent and heavy blow with a large and heavier steel or cast steel rivet hammer which said violent and heavy blow then and thereby caused a flake of steel or cast steel from one or both of said hammers to slough off and fly with great force into plaintiff's eye injuring him, that the claws of said clawhammer were so obviously defective by being bent and broken, rough and serrated, that no test whatever was necessary there to be made in order to know that said hammer was defective, that said clerk knew or by the exercise of ordinary care and diligence should have known and foreseen that by striking said two metallic hammers together with force and violence which he then proceeded to do and did do, that the ordinary, probable and natural consequence of so doing would be to chip off or break flakes or particles of said metallic substance from their main bodies and send them violently in motion and beyond his control, that by reason of said negligent and wrongful conduct of the defendant's said clerk * * * and without any fault or negligence on the part of plaintiff * * * the vision of his eye was totally destroyed", etc. Error is predicated on the action of the trial court in sustaining appellee's demurrer to this pleading.

In support of this ruling appellee says: "Conceding for the sake of the argument the fact that the

hammer purchased was soft on that portion of it hit with the testing hammer and that the act of striking them together was negligent, there is no direct averment from the specific facts that the flake of steel sloughed off from the testing hammer as a result of that alleged negligence. In other words, there is no direct positive connection between the alleged negligence and the injury and therefore no element of negligence is averred against the appellee or its clerk, which shows the cause of the injury. For aught that the complaint shows, the test was made in the proper and regular way as a part of the business of selling hammers in a hardware store." The further contention is that the complaint shows appellant received his injuries as the result of an inevitable accident. It is not denied but that

1. the facts well pleaded show that appellant when injured was rightfully in appellee's store, and while there, appellee and its clerks owed him the duty to keep the storeroom in a reasonably safe condition and to exercise reasonable care to protect him from injury during that time. The remaining question then is, Do the facts also show a failure to perform that duty and an injury resulting to appellant by reason of such failure? In other words, taking all the material facts disclosed by the pleading, Do they show that the accident which appellant received was caused by the negligent act of appellee, or one of its servants, for an employer is liable for injuries wilfully or carelessly inflicted by an employe while in the performance of his duties, whether the particular act complained of was authorized by the employer or not? *Nave v. Flack* (1883), 90 Ind. 205, 46 Am. Rep. 205; *Louisville, etc., R. Co. v. Wood* (1888), 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, and cases cited. The complaint

avers in what respects the clawhammer was

2. defective. One defect is that the material of which it was made was of such a character that particles of that material would slough off from it while in use, that such defect among others was particularly pointed out to appellee's clerk, that he personally observed where such particles had become removed, and yet, knowing these facts, knowing the tendency of flakes of steel or cast steel to slough off or break off, he struck the hammers together in the manner described and while appellant was in a place made dangerous by reason thereof. Under such a state of facts, we are justified in holding that the complaint is sufficient to repel the demurrer upon the theory that the flake of steel which caused the injury came from the defective hammer when struck by the testing hammer.

It can not be successfully contended that the act of appellee's clerk was a pure accident. While in every case it must appear that the injury described

3. must be caused by the negligent act of the party charged, yet it is not necessary that the precise consequences of the negligent act
4. which did occur should have been foreseen by him. *Billman v. Indianapolis, etc., R. Co.* (1881), 76 Ind. 166, 40 Am. Rep. 230; *White Sewing Mach. Co. v. Richter* (1891), 2 Ind. App. 331, 28 N. E. 446. In the case last cited the court on page 334 said, "Every rational being is responsible for his careless acts, and the consequences which follow, according to the practical application of the law of cause and effect, whether he was able to anticipate the particular result or not." See, also, *Fairmount, etc., Assn. v. Downey* (1897), 146 Ind. 503, 45 N. E. 696. It appears from the complaint, we think, that appellee's clerk observed and understood the true condition of the defective hammer, the ten-

dency of small particles to be loosened therefrom when in use, before he attempted to strike it in the manner charged, and that from its appearance he also had reasonable cause to anticipate that by striking it with another hammer likewise composed of steel or cast steel, when the two surfaces were brought together in that manner, one or more particles of steel might fly therefrom and cause injury to any one standing in close proximity. In short, he was given cause to anticipate the happening of some such accident as actually did occur. Appellee has cited a number of proximate cause cases to support its contention, but such cases have no application here, as there is no question of intervening agency involved. That is, the cases cited by appellee differ from the case at bar, in that in those cases no facts were known to the party charged from which he would be held to have anticipated some such result as did follow his conduct. In those cases the accidents which actually happened were entirely unexpected and unanticipated, while in the present case as we have heretofore indicated, the clerk might have anticipated just such consequences as occurred, and was bound to anticipate the natural consequences of his own negligent act.

We are of the opinion that the trial court erred in sustaining the demurrer to the amended complaint. Judgment reversed.

NOTE.—Reported in 111 N. E. 949. As to the test of the master's liability for acts of servant aggrieving third persons, see 54 Am. St. 71. As to whether master is liable for injuries caused by the negligence of his servant by coming in personal contact with third person, see 47 L. R. A. (N. S.) 142. As to liability of master for the acts of servant in excess of instructions, see 5 Ann. Cas. 123. See, also, under (1) 26 Cyc 1528, 1529; (2) 26 Cyc 1571; (3) 26 Cyc 1529; (4) 29 Cyc 495.

HILL v. THE CHICAGO, INDIANAPOLIS, AND LOUISVILLE RAILWAY COMPANY.

[No. 8,968. Filed March 17, 1916.]

1. **APPEAL.—Record.—Exceptions to Rulings.—Questions Presented.**—Where judgment was rendered on demurrer sustained to the complaint, and the only exception disclosed by the record followed the judgment, no question was presented on alleged error in sustaining the demurrer. p. 332.
2. **APPEAL.—Reserving Questions for Review.—Exceptions.—Certainty.**—An exception must be certain and a party will not be permitted to except to one ruling and make his exception apply to another. p. 332.
3. **APPEAL.—Assignment of Errors.—Questions Presented.—Judgment on Demurrer.**—Alleged error in rendering judgment against plaintiff on demurrer presented no question, since by refusing to plead further after the demurrer was sustained plaintiff invited the judgment, and in any event such is not a proper assignment. p. 332.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by Frank Hill against The Chicago, Indianapolis and Louisville Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Abraham Halleck, for appellant.

E. C. Field, *H. R. Kurrie* and *Moses Leopold*, for appellee.

HOTTEL, J.—This is an appeal from a judgment on a demurrer to a complaint in an action brought by appellant to recover damages alleged to have resulted from appellee's failure to keep its promise with appellant to furnish him cars for the shipment of cattle. The errors assigned are: "(1) the court erred in sustaining defendant's demurrer to plaintiff's complaint, (2) the court erred in rendering judgment against plaintiff."

The record showing the ruling on the demurrer, and the judgment rendered, is as follows: "And

this cause is now submitted to the court upon said demurrer and the court after hearing the argument and being duly advised in the premises now sustains said demurrer to the plaintiff's amended complaint, and the plaintiff failing and refusing to plead further the court now renders judgment on the demurrer. It is, therefore, considered and adjudged by the court that said demurrer be sustained and the plaintiff take nothing by this action, and that the defendant recover of the plaintiff its costs and charges in this behalf laid out and expended. To which the plaintiff excepts, and prays an appeal to the Appellate Court of this State."

It will be observed that no exception was saved to the ruling on the demurrer and hence no question is presented by the first error assigned. The

1. entry shows two separate independent rulings, or actions of the court, viz., the ruling on the demurrer and the rendering of the judgment. The exception follows the judgment and there is nothing in the entry to show that the exception was taken to the ruling on the demurrer, rather than to the action of the court in rendering judgment on the demurrer after appellant had refused to plead further. Indeed, so far as the entry shows the exception was to the action of the court in rendering judgment. An exception

2. must be certain and a party will not be permitted to except to one ruling and make his exception apply to another. §656 Burns 1914, §626 R. S. 1881; *State, ex rel. v. Weaver* (1890), 123 Ind. 512, 24 N. E. 330; *Fox v. Town of Monticello* (1882), 83 Ind. 483.

No question is presented by the second assigned error because the demurrer having been sustained to the complaint, appellant, by refusing to

3. plead further, invited the judgment on the demurrer. In any event, this is not a proper

assignment. *Spitzer v. Miller* (1905), 35 Ind. App. 116, 73 N. E. 833; *Walter A. Wood, etc., Mfg. Co. v. Angemeier* (1912), 51 Ind. App. 258, 260, 99 N. E. 500, and cases cited.

We might add that our examination of the averments of the complaint convinces us that no reversible error resulted from the ruling on said demurrer. Judgment affirmed.

NOTE.—Reported in 111 N. E. 951. See, under (1) 3 C. J. 903; 2 Cyc 717; (2) 3 C. J. 900; (3) 4 C. J. 721; 3 Cyc 256.

DIETRICH v. MINAS.

[No. 8,754. Filed October 27, 1915. Rehearing denied February 18, 1916. Transfer Denied March 17, 1916.]

1. APPEAL.—*Assignment of Errors.—Demurrer to Supplemental Complaint.*—An assignment of error in overruling a demurrer to a supplemental complaint presents no question for review. p. 339.
2. APPEAL.—*Review.—Harmless Error.—Supplemental Complaint.—Demurrer.*—Even if the action of the trial court in permitting the filing of a supplemental complaint, and in overruling a demurrer thereto, was erroneous, it was harmless in view of the fact that verdict and judgment were upon a second or additional paragraph of complaint. p. 339.
3. APPEAL.—*Review.—Amendments Pending Trial.*—A judgment on a verdict directed on a second or additional paragraph of complaint, which plaintiff was permitted to file at the close of the evidence, will not be reversed for alleged error in allowing such amendment, where the record discloses that defendant merely objected and made no showing that he was prejudiced thereby, since it must be presumed that the amendment was permitted to conform to the evidence. p. 339.
4. APPEAL.—*Questions Reviewable.—Ruling on Demurrer.—Record.*—No question is presented on the overruling of a demurrer where such demurrer is not in the record. p. 341.
5. APPEAL.—*Questions Reviewable.—Directing Verdict.—Record.*—A consideration of the correctness of an instruction directing a verdict for plaintiff requires an examination of both the issues and the evidence; hence, the question of alleged error in the giving of such an instruction was not properly before the court, where neither the evidence, nor the defendant's answer to the paragraph of complaint on which the verdict rested, was in the record. p. 341.

6. EXCEPTIONS, BILL OF.—*Time for Filing*.—"Reextension".—Under §661 Burns 1914, Acts 1911 p. 193, providing for the extension of time for filing a bill of exceptions, the granting of time beyond the term is in fact one extension of the time, and the word "reextension" as used in the statute applies to and is limited to the first extension obtained as after the extension beyond the term; hence a bill of exceptions not filed within the time as thus limited is not a part of the record on appeal. p. 342.

From Porter Superior Court; *Harry B. Tuthill*, Judge.

Action by Edward C. Minas against Fred C. Dietrich. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

John M. Stinson and *Walter J. Fabing*, for appellant.

L. T. Meyer, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor for damages for the detention of real estate. The action was begun February 14, 1911, before a justice of the peace in Lake County, in which court there was a trial by the justice resulting in a decision and judgment for appellee—that he have possession of the premises and \$27.50 damages and that he recover costs of the action. From this judgment appellant appealed to the Lake Superior Court, from which court this cause, on application of appellant, was venued to the Porter Superior Court. In the latter court appellee, on September 9, 1912, filed a supplemental complaint showing that on August 31, 1911, appellant had vacated the premises, and asking for damages for the detention thereof in the sum of \$1,000. Appellant filed an answer and cross-complaint, neither of which is set out in the record, it being stated therein that after diligent search such pleadings could not be found. On the issues thus tendered, there was a trial by jury and, at the conclusion of the evidence,

appellee, over appellant's objection, was permitted to file a second or additional paragraph of complaint. A demurrer thereto was overruled and appellant then filed an answer thereto. The record shows that neither such demurrer nor answer could be found after diligent search and for this reason, they are not set out. Thereupon the jury was resworn and peremptorily instructed by the court to return a verdict for appellee on his additional paragraph of complaint in the sum of \$775. Pursuant to this instruction, a verdict based on said paragraph for said amount was returned by the jury, on which the court rendered judgment for appellee for \$775 damages and gave appellant judgment for all costs up to and including the date of the judgment, it being stated in the judgment that the costs were taxed to the plaintiff because of the fact that he "had been permitted to open up the pleadings and file an additional paragraph of complaint."

On October 4, 1912, being the nineteenth judicial day of the September term of said court, appellant filed a motion for new trial which was overruled, and appellant was then given 90 days' time in which to present and file his bill of exceptions containing the evidence. An entry of court of date of February 4, 1913, being the fourth judicial day of the February term, 1913, of the court shows the filing of an affidavit sworn to by one of appellant's attorneys. This affidavit is set out in said entry and shows the date of the overruling of the motion for new trial and recites that appellant was given 90 days in which to file his bill of exceptions containing the evidence; that afterwards, to wit, on December 31, 1912, upon proper showing of the service of notice on appellee, appellant moved the court, in vacation, to extend said time for filing his bill of exceptions for the reason that the

court reporter was unable to prepare and furnish a transcript of the evidence in said cause within the time given; that such motion was sustained by the court and the time for filing such bill was extended to February 5, 1913. Such affidavit then further shows that the court reporter will not be able to prepare and furnish such bill within the extended time, to wit, by February 5, 1913; that notice of the application for further extension had been served on appellant, a copy of which is attached to the affidavit. The affidavit closes with a request for a "reasonable reëxtension of the time in which to file such bill". Said record entry then sets out the notice to appellee of said application for reëxtension and shows an appearance thereto by appellee's attorney, and the filing of an affidavit in opposition thereto, which affidavit is not set out in such entry because, as stated therein, it was not found after diligent search. The entry then recites that the court, after considering said application and the appellee's affidavit in opposition thereto, "sustains the motion of plaintiff and he is given ten days' time in which to file his bill of exceptions therein."

The next entry shown by the record is of date April 10, 1913, and shows that the defendant by his counsel files his general bill of exceptions containing the evidence "which general bill is in these words": Then follows what purports to be such bill.

At the close of the evidence and immediately following the words, "and this was all the evidence offered and introduced in the trial of said cause", is the certificate of Walter P. Harrold, official reporter of the Porter Superior Court, dated February 13, 1913, and on the same page written in ink are the words, "Filed Feby. 13th, 1913, G. E. Barnhold, Clerk Porter Superior Court". On the

following page is the certificate of such clerk that the transcript of the evidence in the foregoing cause made by the official reporter was filed in his office on February 13, 1913. Immediately following this certificate but on the next page which is No. 141 of the record is the certificate of the judge of said court bearing date of February 13, 1913, and showing the presentation to him of the reporter's long-hand manuscript of the evidence as and for the bill of exceptions in said cause and showing that such judge not then having time to examine carefully and fully such bill retains it and takes it under advisement for further consideration and approval. Immediately following this certificate and on the next page, which is without a number and between pages 141 and 142, is the following certificate signed by said judge: "State of Indiana, County of Porter, ss: In the Porter Superior Court. Edward C. Minas vs. Fred C. Diedrich. And now the defendant, Fred C. Diedrich, here presents this, the reporter's longhand transcript of the evidence in the above entitled cause, which also sets out the objections of counsel, rulings of the court thereon, to the judge of the Porter Superior Court, and now prays that the same may be examined, approved, signed, sealed and made a part of the record in the said above entitled cause as a bill of exceptions, and the court having heretofore in vacation, on the 31st day of December, 1912, for good cause shown, extended the time for filing said bill until the 5th day of February, 1913, which extension of time was given before the expiration of the 90 days originally granted for the presentation and filing of said bill, as shown by the records of this court, which time was later reextended for a further period of ten days, and the undersigned judge not now having

time to carefully and fully examine said bill of exceptions, does now retain the same and take it under advisement for further examination and approval this the 29th day of September, 1913." The record shows that the date of said certificate as originally typewritten was changed, viz., the figures "29", *supra*, are written in ink over the typewritten figures "13", and the word "September", *supra*, is written in ink above the typewritten word "February", which has a line through it striking it out. Immediately following this certificate and on page 142 of the record is the following certificate: "State of Indiana, County of Porter, ss: In the Porter Superior Court. Edward C. Minas vs. Fred C. Dietrich. And now the court having fully examined the said above bill of exceptions, does now certify the same to be a full, true and complete transcript and record of all that was said and done on the trial of said cause and that it correctly sets forth and contains all of the evidence given in the trial of said cause and the objections and exceptions of counsel and rulings of the court thereon, and the evidence above set forth was all the evidence given in the trial of said cause, and the same is now approved, signed, sealed and ordered made a part of the record as defendant's bill of exceptions No. — all of which is done, this 10th day of April, 1913. (Signed) Harry B. Tuthill, Judge Porter Superior Court. Presented February 13th, 1913. H. B. Tuthill, Judge."

The errors assigned in this court are as follows: (1) Error in overruling the objection of the appellant and permitting appellee to file his supplemental complaint; (2) error in overruling appellant's demurrer to the supplemental complaint; (3) error in permitting "appellee, over the objection of appellant, to file an additional or second paragraph of

complaint, at the close of the evidence in said cause''; (4) error in overruling appellant's demurrer to said second or additional paragraph of complaint; and (5) error in overruling appellant's motion for a new trial.

As to the second assigned error it is sufficient to say that it is based on the ruling on a demurrer to a *supplemental complaint* and hence presents no

1. question to this court for review. *Farris v. Jones* (1887), 112 Ind. 498, 500, 14 N. E. 484; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 133, 137, 83 N. E. 83, and cases cited.

It may be further said as to such assigned error and also as to the first assigned error that even if the court had erroneously permitted the filing of a supplemental complaint and erroneously overruled a demurrer properly addressed to the complaint as supplemented, and appellant had properly assigned such rulings as error in this court, such rulings would be of no avail because the record affirmatively shows that the trial court by its peremptory instruction expressly required the jury to base its verdict on the second or additional paragraph of complaint and that a verdict was returned and judgment rendered accordingly. It necessarily follows that error, if any, resulting from any rulings on the other paragraphs of complaint was rendered harmless. *Gregory v. Arms* (1911), 48 Ind. App. 562, 582, 96 N. E. 196; *Model Automobile Co. v. Sterling* (1912), 51 Ind. App. 78, 87, 99 N. E. 51.

We next consider the third assigned error. The second, or additional paragraph of complaint differed from the original in that it was based on

3. a written lease of the real estate involved, which lease was entered into between appellant and appellee's remote grantor. This lease provided, among other things, that appellant was to

have possession of the property for a period of five years from February 1, 1906, at a monthly rental of \$50 and that in case appellant, at the expiration of the lease, failed to vacate the property and deliver up the possession, he should pay, as liquidated damages for such failure, double the rent specified in such contract during the time of such continued possession and that, in case suit for possession was instituted, appellant should also pay attorney's fees therefor. The verdict directed by the peremptory instruction seems to have been for the rent then due estimated at \$100 a month, plus an attorney's fee agreed on by the parties as a reasonable fee. The statute on the subject of amendments to pleadings (§§403, 405 Burns 1914, §§394, 396 R. S. 1881) is very liberal, and, in the absence of a showing to the contrary, this court will assume in favor of the action of the trial court that the written contract on which said second paragraph of complaint was based had been offered and given in evidence, and that the amendment was permitted to conform to the evidence. The record, as above indicated, affirmatively shows that the trial court, when it permitted the amendment and because thereof, adjudged all costs up to and including the date of the judgment against appellee. Appellant did nothing more than object to the amendment, and after it was granted proceeded with the making up of the issues, and neither before, nor after, the filing of such paragraph made any showing of any kind that he would be, or was, harmed or prejudiced in any way by the amendment. Under such a state of the record, said ruling of the court furnishes no ground for reversal of the judgment below. *Laramore v. Blumenthal* (1915), 58 Ind. App. 597, 108 N. E. 602, and cases cited.

While no question is raised as to the amount of

the judgment rendered by the Porter Superior Court being in excess of the amount of jurisdiction given to justices of the peace under §1721 Burns 1914, §1433 R. S. 1881, yet we deem it proper to say in this connection that it clearly appears from the record that the amount of rent sued for and due appellee at the time he filed his action before the justice of the peace was an amount within the jurisdiction of such court, and that the judgment of the superior court for an amount in excess of such jurisdiction resulted from rents that accumulated and became due because of appellant's continued possession of the property involved after his appeal from the judgment rendered by such justice of the peace.

No question is presented by the fourth assigned error because, as before indicated, the demurrer to

the second or additional paragraph of complaint is not in the record. *Knickerbocker Ice Co. v. Gray* (1905), 165 Ind. 140, 72 N. E. 869, 6 Ann. Cas. 607; *Huber Mfg. Co. v. Blessing* (1912), 51 Ind. App. 89, 91, 99 N. E. 132, and cases cited.

It is finally insisted that the court erred in overruling appellant's motion for new trial. The only ground of such motion which can be said to

be presented by appellant's brief, under the rules of the court, is the sixth ground thereof, viz., that the court erred in peremptorily instructing the jury to return a verdict for appellee on the second or additional paragraph of complaint. Appellant insists that this was an invasion of the province of the jury and cites a number of cases to the effect that it is rarely, if ever, that a peremptory instruction should be given in favor of the one having the burden of the issue. A consideration of the correctness of such instruction would require an exam-

ination of both the issues and the evidence. The record does not contain a copy of the answer to appellee's second or additional paragraph of complaint, but shows that it can not be found. It is apparent, therefore, that this court could not say from an examination of the pleadings alone that such instruction was erroneous. *Lawrence v. Oliver Typewriter Co.* (1912), 51 Ind. App. 434, 436, 99 N. E. 809. It seems equally certain, we think, that the record set out, *supra*, shows that the general bill of exceptions containing the evidence is not properly in the record, and hence that any question depending on the evidence is not properly before us for review.

The act of 1911 (Acts 1911 p. 193, §661 Burns 1914), provides: "That whenever time has been given in which to file a bill of exceptions con-

6. taining the evidence and the party to which such time was given is unable to tender such bill of exceptions within the time given on account of the failure or inability of the court reporter to prepare and furnish a transcript of the evidence, the court during any subsequent term of such court or the judge thereof in vacation may, upon written application under oath and a showing under oath that such facts exist, grant a reasonable extension of the time already granted within which to file such bill of exceptions: *Provided*, That party asking such reëxtension of time shall give the opposite party or his attorneys of record at least three days' notice of the time when and place where said applications would be heard: *and*, *Provided*, *further*, That the application must be made and the time for the hearing thereof set for a day prior to the expiration of the time first given. But no reëxtension of time shall be granted in any case unless it is shown that such failure or inability of the court

reporter was not caused by the negligence of the party asking such reëxtension of time. *If the reëxtension of time is granted during any subsequent term of said court the same must be shown by an order of the court duly entered in the order book of said court and signed by the judge making such order, if such reëxtension is granted by the judge in vacation, the same must be shown by a recital in the bill of exceptions.*" (Our italics.) We find no decision construing the above act with reference to the exact question here involved, but the previous act (Acts 1905 p. 45, §661 Burns 1908) was construed in *Brown v. American Steel, etc., Co.* (1909), 43 Ind. App. 560, 564, 88 N. E. 80, and it was there held that the language of that statute contemplated but a single reëxtension, that is to say, but one extension after the extension originally given extending the time beyond the term at which the verdict was returned. There is nothing in the later act indicating any intent on the part of the legislature to word the act so as to authorize a second reëxtension of time. In the absence of a grant of time beyond the term in which to file a general bill of exceptions, such bill would have to be filed during term, and hence the granting of time beyond the term is in fact one extension of time, and for this reason the word "reëxtension" is used in the statute and applies to and is limited to the first extension obtained after the extension beyond the term. See, *Brown v. American Steel, etc., Co.*, *supra*; *Lengelsen v. McGregor* (1904), 162 Ind. 258, 263, 67 N. E. 524, 70 N. E. 248; *Vandalia Coal Co. v. Yemm* (1911), 175 Ind. 524, 534, 537, 92 N. E. 49, 94 N. E. 881; *Ewbank's Manual* §31 D. It follows, therefore, that appellant's general bill of exceptions containing the evidence was not filed in time, and hence can not be considered by this court.

There are other reasons why such bill should not be considered as a part of the record in this case. The only record entry showing the filing of such bill is that above set out which precedes the bill and shows that it was filed on April 10, 1913. This was beyond the time granted even by the second reëxtension. This may be, and doubtless is, an error. Judging from the respective certificates of the official reporter, the clerk of the court and the judge, above indicated, we have no doubt but that the reporter's transcript of the evidence was filed with the clerk on February 13, 1910, and was on that date submitted to the judge for his approval and signature and after being approved and certified to by the judge was again filed as and for the general bill of exceptions April 10, 1913, and that the court entry erroneously purports to show the date of the first filing when it was in fact the date of the filing after the bill had been approved by the trial judge. The fact remains, however, that there is no *record entry* showing the filing of the transcript of the evidence before April 10, 1913, which, as above stated, was beyond the time allowed even by the second reëxtension, and the explanation indicated would, if correct, furnish no explanation for the certificate of the judge, above set out, appearing on the unnumbered page between pages 141 and 142. This certificate bears a later date than any that either precedes or follows it, and shows that at that time, September 29, 1913, the court still retained such bill for his examination and approval. There is no certificate of later date showing the approval of the bill. It is possible, and indeed probable, that this certificate does not express what the trial judge intended that it should. We are led to believe, from the record in its entirety, that the facts are as above indicated,

and that a bill of exceptions containing the evidence was in fact filed within the time granted by the second reëxtension but that after it was so filed, appellant discovered that it was necessary, under the statute, *supra*, to have such bill of exceptions show his extension of time which was granted to him for the filing of such bill in vacation, and after such discovery appellant then sought to correct or amend the bill already filed by inserting a certificate of the court showing said extension of time and with such end in view prepared the certificate above shown bearing the typewritten date, and the trial judge before signing such certificate redated it as of the date it was presented to and signed by him. This, of course, is, in a large measure, mere conjecture and, if correct, would not authorize us to consider the bill of exceptions now on file; because that part of the bill which shows the extension of time for filing such bill obtained in vacation was no part of such bill at the time of its first filing, and hence the bill as perfected and now appearing in the record was not in fact on file in time. Whatever the facts may be, the record, as it comes to us, is not sufficient under the law to authorize us to consider the general bill of exceptions containing the evidence as any part thereof. It therefore necessarily follows that no question arising under the motion for new trial is presented by the record. *Vandalia Coal Co. v. Yemm, supra*.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 109 N. E. 930. See, under (1) 3 C. J. 1356, 1357; 2 Cyc 989; (2) 4 C. J. 936; 31 Cyc 358; (3) 4 C. J. 748; 3 Cyc 291; (4) 4 C. J. 525, 526; 3 Cyc 158; (5) 4 C. J. 538, 542; 3 Cyc 166, 169; (6) 4 C. J. 299; 3 Cyc 46.

SHAW v. BANKERS NATIONAL LIFE INSURANCE COMPANY.

[No. 8,896. Filed March 29, 1916.]

1. CORPORATIONS.—*Insurance.—Board of Managers.—Exercise of Power.—Contract.*—Where the by-laws of an insurance company provided for a board of managers consisting of three members to be appointed by the directors, that the powers conferred should be exercised by them jointly, and that the majority voice of the managers should prevail in all things, the provisions of a contract executed pursuant thereto between the company and the persons designated as managers must be deemed to have contemplated joint action after consultation, and as conferring authority to act only as a board, so that the withdrawal of a majority of the members destroyed the existence of the board and the remaining member was unable to exercise its powers. pp. 354, 355.
2. CORPORATIONS.—*Insurance.—Articles.—Unnecessary Provisions.*—A provision in the articles of incorporation of an insurance company organized under §4739 *et seq.* Burns 1914, Acts 1897 p. 318, creating a board of general managers consisting of three members to be appointed by the directors, was not required by the statute, and could have no greater force or effect than as a by-law. p. 355.
3. CORPORATIONS.—*Insurance.—Board of Managers.—Contract.—Termination.*—Where a contract between a life insurance company and three persons designated as a board of managers was entered into by the company because each member of such board was understood to be an expert in a field pertaining to life insurance distinct from that in which the others were understood to be efficient, so that a combination of such skill and knowledge would thereby be procured, such contract was terminated by the retirement of two of such persons, since it was impossible for the company to thereafter receive the benefit of the skill and knowledge contemplated. p. 356.
4. CORPORATIONS.—*Insurance.—Contract with Managers.—Rescission for Fraud.*—False and fraudulent representations of three of the organizers of an insurance company, who were also members of its board of directors, that they had procured the requisite applications to entitle the company to be incorporated, being one of the potent factors in inducing the board of directors to execute a contract naming them as the board of managers justified the directors in rescinding the contract on ascertaining the facts. p. 357.
5. CORPORATIONS. — *Directors.—Delegating Powers.* — Although a board of directors may for the term of its existence delegate its powers involving discretion to a board of managers, it can not do so beyond recall for a period extending long beyond such term. p. 357.

Shaw v. Bankers, etc., Ins. Co.—61 Ind. App. 346.

From Marion Circuit Court (21,885); *Charles Remster*, Judge.

Action by the Bankers National Life Insurance Company against Guy G. Shaw. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George A. Cunningham and *Daniel H. Ortmeyer*, for appellant.

Frederick E. Matson, *Edward E. Gates*, *James A. Ross*, and *Robert D. McCord*, for appellee.

CALDWELL, J.—This appeal is prosecuted from a decree enjoining appellant from exercising any of the rights and privileges and from performing any of the duties in terms created in him, together with two associates, by a certain contract, executed by appellee to them under date of April 11, 1912, and also from doing certain acts to the prejudice of appellee, its officers and agents, in the management of the affairs of the company. The sole error assigned is predicated on the overruling of appellant's motion for a new trial. To determine this appeal, it is necessary to consider only the sufficiency of the evidence to sustain the decision. The somewhat voluminous evidence is in substance as follows: Prior to April, 1912, appellant and his two associates took steps looking to the organization of a mutual life insurance company on the assessment plan under the provisions of the act of 1897. Acts 1897 p. 318, §4739 *et seq.* Burns 1914. In carrying out their purpose, they interested nine other gentlemen in the enterprise, to wit, George Lemaux, W. P. Edmondson, George M. Weber, William A. Walker, Edgar L. Apperson, Riley C. Adams, W. F. Hughes, Eben H. Wolcott, and David B. Hill. As a result, appellee was organized as a mutual life insurance company. Under date of April 2, the twelve gentlemen, as prospective incorporators,

signed and acknowledged articles of incorporation. The articles contained the specifications required by said act, only two of which need be specifically mentioned: First, a specification that the incorporators other than Hughes should constitute the board of directors, eleven in number, until the first annual meeting. Second, as required by said act, the articles contained a certification to the effect that the prospective incorporators had procured *bona fide* applications for insurance from 200 persons, amounting to \$200,000, and that each applicant had been recommended by a reliable physician, and that each had paid to the incorporators \$2 on each \$1,000 of insurance applied for by him. Reference is made also to the certificate of a solvent bank to the effect that such advance funds had been deposited with it to be turned over to the treasurer of the company when organized. The articles contained also a specification not required by the statute that the board of directors therein named "shall have the power to create and may temporarily delegate its powers to an executive committee of not less than three nor more than seven members, and shall have power to create and appoint a board of general managers consisting of three members, and shall make such contract with and grant them such powers and remuneration and require such duties as may be agreed upon and set out in the contract of employment".

April 9, being before the incorporation of the company had been perfected by filing the articles, etc., the other nine incorporators entered into a contract in writing with appellant and his two associates, reciting therein that the latter three had promoted the company, and to that end had expended time and performed labor, and providing among other things that in consideration of

services performed by them in securing the number and amount of applications for insurance necessary to the organization of the company, and in making medical examinations of the applicants, and further, in consideration of the benefits likely to accrue to the company from the continued service and technical knowledge of the subject and system of life insurance possessed by appellant and his two associates, the nine former, eight of whom were named as directors by the articles of incorporation, agreed that at the first meeting of the board of directors after the incorporation of the company had been perfected, they would direct the execution of a contract in behalf of the company, by which appellant and his two associates should be employed as general managers of the company on terms specified by the contract of employment, a copy of which was annexed to and referred to by such contract of April 9.

The incorporation of the company was perfected April 11. Thereafter, but on the same day, the board of directors met and organized by the election of appellant and his associates with others as the executive officers. Thereupon, by the unanimous vote of the board of directors, except appellant and his two associates, the contract, a draft of which was annexed to the contract of April 9, was executed, it being signed on behalf of the company by certain officers designated to that end, and by the signatures of appellant and his two associates being appended thereto. Appellee is named as first party, and appellant and his two associates as second parties to the contract. It provides in substance that the second parties are thereby appointed general managers of the company, and that as such they shall have the general management of all the affairs of the company with full power to execute the

same; that they shall appoint all agents and employes which, under the plan of organization, were to be appointed, with power of dismissal for cause. The third specification is as follows: "The powers in this clause delegated to the said parties of the second part are that said second parties shall fix all premium rates, approve all policy forms, fix the minimum and maximum of all ages to be insured, and the classes of risks to be accepted before the same be effective or operative by the said company." There are other provisions that it shall be the duty of the second parties to obtain in their names jointly the proxies of all the policy holders as members of the company, or as many of them as possible, and to vote such proxies at all meetings. It is provided that appellant shall be paid for his services as a member of the board of managers \$1,800 per year, payable annually, and also three per cent of the gross annual premium or assessment income. The compensation of one of appellant's associates under the contract is fixed as the same in amount and per cent as appellant's. The compensation of appellant's other associate as a member of the board of managers is fixed at one and one-fourth per cent of such gross income, but he is named also as general counsel to serve through the life of the contract, with a provision that for his services in such capacity, he shall be paid reasonable compensation to be fixed by the board of managers, with the stipulation that his total compensation in any year as a member of such board and as general counsel shall not exceed the sum paid appellant for the same time. It is provided also that each member of such board shall be paid his reasonable traveling expenses and his expenses incurred in entertaining visiting agents and members of the company, and also that he shall be paid the usual

commission on all insurance written by him. There is a provision that it shall be the duty of the members of such board to act harmoniously and avoid disagreements and friction, and that a majority voice of the managers shall prevail on all things and at all times. The by-law on the subject of the appointing of the board of managers is as follows: "The board of directors shall create and appoint a board of general managers consisting of three members, and shall make a contract for a period of years with the members of such board of general managers and grant to them such powers and remuneration and require such duties to be performed as may be agreed upon and set out in the contract of employment so made."

There was evidence that soon after the execution of the contract creating the board of managers, strife and contention arose among appellant and his associates as members of such board respecting the affairs of the company. As a consequence, one of such associates by a writing dated July 23, 1912, abrogated such contract and released appellee from all liability thereunder, and retired from the board. September 12, 1912, the other associate by a like writing took a similar action. Thus appellant remained as the sole member of such board. Shortly thereafter the board of directors deeming the contract with appellant and his associates terminated by the withdrawal of the latter, negotiated with the former respecting a new contract. Appellant, however, insisted that the contract was in force as to him, and that he was authorized to exercise all the rights and powers thereby granted to the board of managers.

Appellant and his associates as promoters had undertaken the work of procuring the number of applications for insurance required in order that

the company might be incorporated. There was abundant evidence that both before and after the execution of the contract creating the board of managers, they frequently represented to the directors and stockholders that they had procured such applications, and that the required advance payments had been made thereon. At one of the preliminary meetings of the company, they exhibited a bundle of papers with the statement that it contained two hundred good-faith applications, representing \$200,000 of insurance applied for. The bundle in fact did contain that number of papers in the form of applications, and apparently properly signed, but it was conclusively established at the trial that at least 190 of them did not constitute *bona fide* applications for insurance, and there was substantial evidence that the signatures thereto represented fictitious and unascertained persons. The incorporators, however, signed applications for insurance, and made payments thereon in advance in amounts sufficient so that when deposited, the certificate of a bank as above referred to was procured. In short it was practically conceded at the trial that that step in the organization of the company relating to the procuring of applications for insurance was not in fact taken; that an appearance indicating that it had been taken was created for the purpose of procuring from the State officials designated by the statute the certificates necessary to incorporation, and the transaction of business. Appellant at the trial urged in extenuation that all the incorporators and directors had full knowledge of the deception, and that they at least passively participated therein. There was, however, a lot of substantial evidence that the directors and incorporators were deceived by appellant and his associates, and that they in good faith believed that such

fictitious applications were genuine and that advance payments had been properly made thereon, and that shortly before November 12, 1912, they first ascertained the real facts. At about the same time the attorney-general of the State submitted to the company an opinion in writing to the effect that the contract creating the board of managers in its substantial features was void. Appellee at this time was continuing its negotiations with appellant, to the end that some new and satisfactory arrangement might be made respecting the management of the company, it being appellee's contention that the contract made with appellant and his associates conferred authority on them jointly as a board, and that the abrogation of the contract by the latter and their retiring from the board of necessity terminated the contract. In view of the entire situation thus presented, the board of directors on November 12, having acquired knowledge as aforesaid, and having caused payment in full to be made to appellant to that date for his services under the contract, by a lengthy resolution, reciting the facts, a copy of which was served on appellant, declared the contract to be null and void and terminated, and thereupon selected a temporary general manager to serve until proper steps might be taken pursuant to the by-laws. Appellant thereupon, insisting that it was within his exclusive province to manage the affairs of the company by virtue of said contract, took possession of all the books, papers and records of the company, locked the office and excluded therefrom appellee's officers, directors and agents, and did other acts indicating a purpose to control and manage the prudential affairs of the company within the specifications of said contract to the exclusion of all other persons.

By the decree appealed from, appellant in effect is enjoined from interfering with the board of directors in managing the affairs of the company; from interfering with appellee's employes in performing their duties under the direction of the board of directors; from locking appellee's office against its directors, officers and employes; from acting in any other capacity than as director and first vice president; from removing appellee's papers, documents, etc., and from refusing to deliver them to appellee's proper officers; and from performing the duties of general manager as specified by said contract. The decree operated to restrain appellant from doing certain acts which by the strict terms of the contract, if valid, he and his associates were authorized to do, and also from doing or continuing certain other specific acts apparently provoked by the action of the board of directors in declaring the contract terminated. It follows that, if the contract was valid and yet in force against appellee and in favor of appellant, and if the act of the former in declaring it null and at an end was unwarranted, there is a lack of equity in appellee's cause, and the decree can not be upheld.

The first question that presents itself is whether the contract clothed appellant and his associates with joint powers only or whether such powers

1. were to be exercised by them severally; and if they were to be exercised jointly only, whether the abrogation of the contract by appellant's associates, and their retiring from the board of managers terminated the contract as to appellant. Appellant's position is that all the powers prescribed by the contract were delegated to each member of the board or to all of them severally, and the other members having withdrawn that he alone was clothed with such powers to the exclusion

of all other persons or bodies. As we have indicated, there is a specification in the articles that "a

2. board of general managers consisting of three members" shall be appointed. As the statute under which appellee was organized does not require that the articles contain such a specification, it can have no greater force or effect than as a by-law. *State, ex rel. v. Anderson* (1903), 31 Ind. App. 34, 67 N. E. 207. Nevertheless, such

1. provision may be considered in determining the nature of the body created pursuant thereto. The by-laws also, as we have said, provide that such a board shall be created. The contract by the terms of which appellant and his associates are named as the members of such board, provides specifically that certain designated powers shall be exercised by them jointly, and also that the "majority voice of said managers shall prevail in all things and at all times." This language necessarily excludes individual action, and contemplates joint action after consultation. It follows that in the exercise of the prudential powers conferred on appellant and his associates, they were authorized to act only as a board, but might act by a majority vote as indicated in the contract. 10 Cyc 773, 774; *McNeil v. Boston Chamber, etc.* (1891), 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559; 7 R. C. L. 439; *Wright v. Floyd* (1909), 43 Ind. App. 546, 86 N. E. 971. Each member of the board of managers was an entity distinct from the organized body. Upon the former no power was conferred. All the authority contemplated by the contract was vested in the latter. The withdrawal of a majority of the members of such board destroyed its existence. There was no provision by which it might be restored or reconstructed. It could not, therefore, longer dis-

charge the specified duties. Under such circumstances, appellant ascribed to himself as an individual all the powers conferred on the board and insisted that he was authorized to exercise them. It would, therefore, seem apparent that the action of the board of directors in declaring the contract terminated was in fact but a recognition of its status, as changing circumstances had already established it, and that the action of the board of directors was warranted and that the court properly enjoined appellant not only from committing the extreme and violent acts indicated by the decree, but also from exercising powers conferred only on the board of managers. There is another

3. view: The preliminary writing of April 9, shows on its face that the incorporators in pledging themselves to procure the execution of the contract designating the members of the board of managers and prescribing the powers and duties of such board were induced very materially thereto by the fact that appellant and his associates were understood to possess marked technical knowledge of the subject of life insurance, whereby it was deemed that their services would be very advantageous to the company. There was other evidence that each of these gentlemen was an expert in a field pertaining to life insurance distinct from that in which the others were understood to be efficient, and that the board of directors contracted to procure the combination of knowledge and skill presumed to be possessed by the three. The retiring of the two members of the board rendered it impossible therefore for the company to receive the benefit of the skill and expert knowledge contemplated by the contract, and in the absence of which there is nothing to indicate that there would have been a contract. The retiring of the two members therefore

terminated the contract. See *Miller v. Ready* (1915), 59 Ind. App. 195, 108 N. E. 605, and cases; *Campbell v. Faxon* (1906), 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002, note.

It is apparent also from our statement of the facts that the representations made by appellant and his associates that they had procured applications for insurance as we have indicated, was a very potent factor in inducing the board of directors to execute the contract naming the members of the board of managers, and prescribing their powers. Such fact contributed materially to the impression that they did possess technical skill and knowledge respecting life insurance, and a peculiar ability in dealing with it. As we have indicated, there was substantial evidence that such representations were false and justified an inference that they were fraudulently made. Appellant and his associates sustained such a relation to the company, being directors and executive officers, as demanded from them openness of purpose and action and the utmost good faith. For this reason the board of directors was justified in rescinding the contract on ascertaining the facts. It follows without further elaboration that the decision is sustained by the evidence.

We do not deem it wise to terminate our discussion without a word respecting the fundamental nature of the contract under consideration.

5. The act under which appellee is organized requires that its affairs be managed by a board of directors. In addition to the general provision to that effect, it is prescribed that certain specifically designated powers shall be exercised by such board. §§4740, 4741 Burns 1914, Acts 1897 p. 318. The contract under consideration not only delegates to the board of managers a very consid-

erable and important part of such powers, including those so specifically designated, but also so delegates them for a period of thirty years. These powers are of a nature calling for the exercise of judgment and discretion. The members of the board of directors that executed the contract were named to serve until the next annual meeting or less than one year. It follows that that board in terms delegated powers to be exercised for years beyond the short term during which such powers were committed to it. The effect of the contract, if valid, was to the extent that powers were thereby delegated to deprive the stockholders at the next annual meeting and thereafter during the life of the contract, of the right to call to the service of the company the judgment and discretion and practical wisdom of such of their number as they might name as directors. On the question of the authority of the board of directors to delegate its powers, we quote the following from 2 Thompson, Corporations (2d ed.) §1200: "Whatever may have been the strictness of the rules formerly on the question of the delegation of powers by a board of directors, it is apparent that the doctrine has been very liberally extended in recent corporation law. While some restrictions still necessarily exist, yet it is now granted that boards of directors or trustees may ordinarily delegate to a less number their general powers. What might be called the modern rule is stated in a valuable work on corporations, thus: [Clark & Marshall, Corporations §732.] 'Where the charter, general law, or a by-law vests the general superintendence and control and active management of all the concerns of a corporation in a board of directors or trustees, as is generally the case in business corporations, the board constitutes to all purposes of dealing with others, the corporation, and do not, at

least in the general management of the corporate business, exercise a delegated authority in the sense of the rule prohibiting delegation of authority to an agent; and it has been held, therefore, that they have authority, acting as and for the corporation, to delegate to subordinate officers or agents, or to a committee of their own number, the power to perform any act, in the course of the business of the corporation, which they themselves can legally perform, although the performance of the act may involve the exercise of the highest judgment and discretion' ". Also the following from 2 Cook, Corporations (4th ed.) §715: "There formerly was some doubt as to whether the powers of a board of directors might be delegated to an executive committee. The right of the board of directors to delegate to agents the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary. But in matters involving discretion there are decisions to the effect that the directors cannot delegate that discretion. The clear weight of authority, however, holds that the powers of a board of directors may be delegated to an executive committee of that board, and the acts and contracts of such a committee may be made binding on the corporation."

Assuming, without deciding, that a board of directors may for the term of its own existence delegate powers as comprehensive as in the contract here, we know of no decision or authority that it may be done beyond recall to be effective for such an extended period. See *Wainwright v. P. H. & F. M. Roots Co.* (1912), 176 Ind. 682, 687, 97 N. E. 8. The judgment is affirmed.

NOTE.—Reported in 112 N. E. 16. As to the trustee character assumed by members of board of managers, see 139 Am. St. 602. See, also, under (1) 10 Cyc 773; (4) 10 Cyc 275.

MIAMI COUNTY BANK v. STATE OF INDIANA, EX REL.
PERU TRUST COMPANY, ADMINISTRATOR,
ET AL.

[No. 9,337. Filed March 29, 1916.]

1. **APPEAL.**—*Record.—Ruling on Demurrer.—Waiver of Error.*—Alleged error in overruling a demurrer is waived by appellant's failure to set out the demurrer or the substance of the same, and by failing to set out any memorandum of objections to the complaint. p. 366.
2. **BANKS AND BANKING.**—*Trust Funds.—Liability of Bank.*—A person having charge of trust funds may deposit them in a bank to the credit of his personal account and check them out in the usual course of business, and the bank, though knowing the character of the funds, is not thereby made liable to the beneficiary or actual owner in the absence of knowledge that the depositor is misappropriating such funds; but if, with knowledge of the character of the funds, the bank applies them to the payment of the personal debt of the depositor to it, or knowingly accepts payment out of such funds, or knowingly assists or permits the depositor to misuse or misapply the funds, it may be held liable therefor to the beneficial or actual owner. p. 368.
3. **BANKS AND BANKING.**—*Trust Funds.—Knowledge of Character of Funds.—Liability of Bank.*—The fact that a bank has knowledge that funds deposited are trust funds is an important circumstance which calls for caution in dealing with and honoring checks upon such deposit, though such knowledge is not sufficient in and of itself to create liability or to cause the bank to require the depositor to place such funds in an account separate and apart from his individual account. p. 369.
4. **SUBROGATION.**—*Right of Surety.—Misappropriation of Trust Deposits.*—An administrator's surety, which had not satisfied the demands of the estate for funds which the administrator failed to account for, could not enforce an equitable right of subrogation against a bank in which the administrator had deposited the funds and which had permitted him to check them out with knowledge that he was misapplying them. p. 372.
5. **BANKS AND BANKING.**—*Trust Funds.—Action on Bond.—Liability of Bank.*—Where a bank permitted an administrator to deposit funds of the estate to his individual account, and to check against such funds while knowing that he was misapplying them, liability could not be enforced against it in an action on the bond of the administrator which it did not execute, since its liability was not *ex contractu*, but was that of a cotrustee *ex maleficio*, by reason of its wrongful dealing with such trust fund. p. 373.

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6. *Action.—Misjoinder.—Parties.—Causes of Action.*—While the misjoinder of causes of action is not in itself ground for reversal, the most liberal construction of the code would not countenance a pleading in which an action upon contract and one in tort are joined, and in which it is sought to enforce liability upon the contract against one of the parties whose liability is solely in tort. p. 374.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by the State of Indiana, on the relation of the Peru Trust Company, administrator *de bonis non* of the estate of Fred M. Perry, deceased, against the Miami County Bank and others. From a judgment for plaintiff, the defendant named appeals. *Reversed.*

Cox & Andrews, for appellant.

Albert Ward and *Antrim & McClintic*, for appellees.

FELT, P. J.—This is an appeal from a judgment of the Miami Circuit Court rendered against appellant and John F. Perry, as principals, and William and H. G. Ballard and Maryland Casualty Company, as sureties, in favor of Peru Trust Company, administrator *de bonis non* of the estate of Fred M. Perry, deceased. The errors assigned and relied on for reversal of the judgment are in substance as follows: (1) the overruling of appellant's demurrer to the complaint of appellee State, ex rel. Peru Trust Company, administrator *de bonis non*, etc.; (2) the overruling of appellant's separate demurrer to each of the first, second and third paragraphs of the cross-complaint of Maryland Casualty Company; (3) the overruling of appellant's motion for a new trial; (4) the overruling of appellant's motion to modify the judgment; (5) error of the court in each separate conclusion of law Nos. 1, 2, 3, 4 and 5, respectively;

(6) the overruling of appellant's motion in arrest of judgment.

Some of the undisputed facts of the case are as follows: On November 9, 1912, John F. Perry was appointed administrator of the estate of Fred M. Perry, deceased, and qualified as such administrator and gave bond in the sum of \$100, with appellees William and H. G. Ballard as sureties thereon. On March 14, 1913, said administrator gave an additional bond in the sum of \$5,000 with appellee Maryland Casualty Company as surety. From 1911, until the trial of this case, appellant was a partnership engaged in the banking business and John F. Perry had a deposit and checking account with such bank. On April 9, 1913, said administrator received a draft for \$4,250 from a railway company payable to the order of "John F. Perry, administrator of estate of Fred M. Perry, killed near Traft, Cal., November 9, 1912." On April 17, 1913, said John F. Perry endorsed said draft, "John F. Perry, administrator" and placed it with appellant for collection, and on said day appellant gave John F. Perry credit on his individual checking account for the face value of the draft. On said day John F. Perry owed appellant \$2,300 and, before making the deposit, he had to his credit in his checking account the sum of \$11.41. On May 16, 1913, appellant applied on the aforesaid indebtedness of John F. Perry \$1,944.39 of the deposit, by charging that amount against his checking account. The balance of the funds to the credit of Perry was checked out by him for his individual use from time to time and on September 13, 1913, his checking account with appellant was overdrawn \$30.99. On June 11, 1914, John F. Perry resigned as such administrator, without accounting to the estate for the funds, and appellee

the Peru Trust Company was appointed administrator *de bonis non* of the aforesaid estate and thereupon brought this suit against John F. Perry, William Ballard, H. G. Ballard, Maryland Casualty Company, Miami County Bank, and Millard F. Pearson, receiver of the estate of John F. Perry.

The first paragraph of complaint is against John F. Perry and William and H. G. Ballard sureties on the bond for \$100. It avers the execution of the bond for \$100, the receipt and deposit of the funds by John F. Perry in the Miami County Bank and charges that, while acting as such administrator, he unlawfully embezzled and appropriated said money to his own use and has wholly failed and refused to turn over the same or any part thereof to persons entitled to receive the same; that said Perry and his sureties on said bond are liable for the full amount of said money so embezzled as aforesaid with ten per cent penalty, a copy of which bond is filed with and made a part of the complaint. The second paragraph of complaint is against John F. Perry, Maryland Casualty Company and Millard F. Pearson, receiver, "on the second bond given by John F. Perry as administrator" in the sum of \$5,000. The third paragraph of complaint is against John F. Perry, Maryland Casualty Company, Millard F. Pearson, receiver of John F. Perry and appellant. It alleges Perry's appointment as administrator, the execution of the bond for \$5,000 with Maryland Casualty Company as surety thereon; and alleges the condition of the bond to be that Perry should faithfully discharge his duties as administrator according to law, and the bond is made a part of the pleading by exhibit. It contains substantially the same averments as the first paragraph as to the deposit of the funds by Perry and the wrongful application

and embezzlement of the trust funds, and in addition thereto charges that said Perry and appellant "unlawfully conspired together for the purpose of converting and appropriating said money * * * and on or about the 17th day of April, 1914, * * * did in fact convert and appropriate said money * * * to their own joint use and benefit. * * * That by reason of the foregoing, the terms and conditions of the bond aforesaid have been broken and violated and the defendant John F. Perry, Maryland Casualty Company, and the Miami County Bank are liable to pay to the relator the full amount of the money so converted and appropriated by the defendant Perry together with interest thereon from April 17, 1914, and ten per cent penalty; * * * Wherefore, this relator demands judgment against each of said defendants for the sum of five thousand dollars * * * and for all other just and proper relief in the premises."

The Maryland Casualty Company answered the complaint by general denial and also filed a cross-complaint in three paragraphs against appellant. The first paragraph of the cross-complaint of the Maryland Casualty Company avers in substance that appellant knew that John F. Perry had and held said \$4,250 as such administrator and knew that the same belonged to the estate; that, with such knowledge, it accepted the same as a deposit and knowingly and wrongfully placed the same to the credit of said Perry on his individual account, and knowingly and wrongfully aided and abetted him in diverting, misappropriating and commingling said trust funds with his individual funds, and thereafter with such knowledge suffered and permitted said Perry from time to time, to withdraw said money from the bank on his individual checks for his own use and benefit; that, by reason of the

wrongful assistance so given Perry by appellant, he diverted, commingled and misappropriated all of said funds to his own use and embezzled the same; that, by reason of the acts aforesaid, appellant became and is jointly liable with said John F. Perry, as principal for the payment of the amount of money so received and misappropriated as aforesaid. The second paragraph of cross-complaint contains substantially all of the averments of the first and also alleges the execution of the aforesaid bond for \$5,000; that said Perry resigned as administrator and failed to account for said funds, the details relating to the receipt, deposit, and misuse of which are alleged; that cross-complainant was only a surety on said bond; that John F. Perry was indebted to appellant when he received said trust funds and it wrongfully applied \$3,500 of said funds to the payment of his individual debt, and thereafter wrongfully aided and abetted said Perry in commingling said trust funds with his own money and, with knowledge of the character of said funds, suffered and permitted him from time to time to withdraw the balance of said funds for his individual use whereby he embezzled the same. The third paragraph is substantially the same as the second, except, that it is averred that appellant is a corporation duly organized under the laws of the State of Indiana, and is doing a general banking business. Each paragraph of cross-complaint prays that appellant be held jointly liable with John F. Perry as principal in accounting for and paying the amount due on the trust fund; that the property of appellant and Perry be first exhausted before cross-complainant is compelled to pay any part of the amount found due the relator, Peru Trust Company, administrator.

Appellant demurred to the complaint, and to

each paragraph of the cross-complaint for insufficiency of facts alleged. The demurrers were overruled and exceptions taken. Issues were joined on the cross-complaint by general denial. Appellant has waived any question on the demurrer

1. to the complaint by failing to set out the demurrer or the substance thereof and by failing to set out any memorandum of objections to the complaint as required by the statute. However, in so far as the sufficiency of the facts relied upon for a recovery is concerned, substantially the same questions arise on the exceptions to the conclusions of law that are discussed by appellant in considering the sufficiency of the complaint.

Most of the facts relating to the transactions involved are not controverted. The undisputed facts above set out and those alleged in the pleadings are in substance stated in the finding of facts. Omitting the formal and undisputed facts aforesaid, the finding is in substance as follows: That John F. Perry resigned as administrator on June 11, 1914; his resignation was accepted by the court and on the same day appellee, the Peru Trust Company was duly appointed administrator *de bonis non* of the estate; that John F. Perry was principal and Maryland Casualty Company surety on his bond for \$5,000 and no part of the funds of the estate came into the possession of said surety company; that John F. Perry, on June 16, 1911, opened an account with appellant and deposited \$6,000 and since then has continued to have an account with appellant; that from June 16, 1911, to October 7, 1912, he deposited and checked out more than \$34,000 and at the latter date had to his credit, \$1,039; that he owned valuable real estate in the town of Amboy where he lived and where the bank was located; that on October 8, 1912, he presented

to the bank, for the purpose of obtaining a loan, a statement showing his net assets to amount to \$15,000; that appellant believed him to be truthful, honest and solvent; that said Perry at no time had an account with the bank as administrator; that in January, 1914, in a proceeding in court, John F. Perry was found to be insolvent and Millard F. Pearson was appointed receiver for his estate. The facts, in regard to the receipt, deposit and disposition of the draft for \$4,250, are found as alleged and likewise the execution of the two bonds given by John F. Perry; that on April 17, 1913, John F. Perry unlawfully converted and appropriated said sum of \$4,250 to his own use, and is now insolvent and has wholly failed, neglected and refused to turn over to appellee, the relator, any part of said funds; that appellant desired Perry to obtain possession of funds with which he could pay his indebtedness to the bank and Perry desired control of the money to use in his individual business and, on April 17, 1913, appellant and Perry, knowing the draft belonged to the estate of Fred M. Perry, deceased, "conspired and confederated together for said purpose and mutually agreed that the proceeds of such draft should be by said bank placed to the credit of the individual deposit account of said Perry and pursuant to said agreement, the proceeds of said draft were so deposited and \$1,944.39 thereof was by said bank applied on the individual indebtedness of said Perry and the balance of said proceeds were withdrawn from said bank and used by said Perry in his individual business." That appellant with the knowledge aforesaid, placed the amount of the draft to Perry's credit in his individual account with the bank and commingled it with his individual funds and thereby enabled him to withdraw it on his individual check for his own

use, and by reason thereof the whole sum was converted to his individual use and squandered; that during all said time John F. Perry was making deposits in said bank in his personal account and his checks were honored by the bank; that Millard F. Pearson, Perry's receiver, took into his possession property of Perry and reduced the same to cash aggregating over \$13,000, of which amount he still has in his possession \$3,500.

On the foregoing finding of facts the court stated its conclusions of law: (1) that Miami County Bank by its acts became cotrustee with John F. Perry in the management of the assets of said estate and jointly liable with him as principal in accounting for said trust funds; (2) that the administrator *de bonis non* ought to recover of John F. Perry, Miami County Bank, Ballard and Ballard and Maryland Casualty Company, \$5,119.12; (3) that the property of John F. Perry and Miami County Bank should be first exhausted before resort is had to the property of Ballard and Ballard and Maryland Casualty Company; (4) that the residue be recovered as follows: one fifty-first part from Ballard and Ballard and fifty fifty-first parts from Maryland Casualty Company, but not exceeding the amount of each of said bonds.

An administrator or other person having charge of trust funds may deposit them in bank to the credit of his personal account and check them out in the usual course of business and the bank,

2. though it has knowledge of the character of the funds so deposited, is not thereby made liable to the beneficial or actual owners of such funds, in the absence of any knowledge on its part that the funds are being misappropriated or misapplied by such trust officer. If the bank, with knowledge of the character of the funds so

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deposited, applies them to the payment of the personal debt of the depositor due such bank, or knowingly accepts from him payment of his individual debt out of such funds, or knowingly assists, or permits such depositor to misuse or misapply such funds, it may be held liable therefor to the beneficial or actual owner thereof to the amount of the funds so misapplied or misused. The fact that the bank has knowledge of the character of the funds

3. is an important circumstance which calls for caution in dealing with, and honoring checks upon such deposits, though such knowledge is not sufficient in and of itself to create liability or to cause the bank to require the depositor to place such funds in an account separate and apart from his individual account. *Bundy v. Town of Monticello* (1882), 84 Ind. 119, 127; *United States Fidelity, etc., Co. v. Adoue & Lobit* (1911), 104 Tex. 379, 137 S. W. 648, 652, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914 B. 667; *Duckett v. National Mechanics Bank* (1897), 86 Md. 400, 38 Atl. 983, Am. St. 513; 39 L. R. A. 84, *United States Fidelity, etc., Co. v. First Nat. Bank, etc.* (1912), 18 Cal. App. 437, 123 Pac. 352; *Fidelity etc., Co. v. Rankin* (1912), 33 Okl. 7, 124 Pac. 71; *Allen v. Puritan Trust Co.* (1912), 211 Mass. 409, 97 N. E. 916, L. R. A. 1915 C 518; *American Nat. Bank v. Fidelity, etc., Co.* (1907), 129 Ga. 126, 58 S. E. 867, 869, 12 Ann. Cas. 666; *Town of East Hartford v. American Nat. Bank* (1882), 49 Conn. 539; *United States Fidelity, etc., Co. v. Peoples Bank* (1913), 127 Tenn. 720; 157 S. W. 414; *Fisher v. Brown* (1870), 104 Mass. 259, 6 Am. Rep. 235; 5 Cyc. 516; *Shepard v. Meridian Nat. Bank* (1898), 149 Ind. 532, 546, 48 N. E. 346; *McLain v. Wallace* (1885), 103 Ind. 562,

5 N. E. 911; *McEwen v. Davis* (1872), 39 Ind. 109, 114; *Board, etc. v. Newark City Nat. Bank* (1891), 48 N. J. Eq. 51, 21 Atl. 185; *State Nat. Bank v. Reilly* (1888), 124 Ill. 464, 14 N. E. 657; *Interstate Nat. Bank v. Claxton* (1904), 97 Tex. 569, 80 S. W. 604, 104 Am. St. 885, 65 L. R. A. 820; 3 R. C. L. 549, §177, *et seq.*

The language employed by the Supreme Court of Maryland in *Duckett v. National Mechanics Bank, supra*, 403, is appropriate here: "There can be no dispute that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the money, and may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. 2 Pomeroy, Eq. Jurisp. §1079. There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in the breach of trust; because all are equally amenable. * * * If the bank knowingly aided and participated in Clagett's breach of trust, then the bank is, beyond dispute, as responsible to the new trustees as is the defaulting trustee himself. This liability of the bank depends, however, altogether upon the contingency that it knowingly aided the trustee, Clagett, to commit the default of which he was undeniably guilty. If without knowledge of Clagett's misconduct, or if without sufficient notice to put it on inquiry that would have enabled it to ascertain that Clagett was mingling with his individual deposits and using as his own, money that the bank knew or had the means of knowing was trust money; or if the bank was merely the

innocent agency through which, without fault or negligence on its part, Clagett depleted the trust estate, then it was not guilty of aiding him in misappropriating the trust fund and is not liable to restore it. * * * It is true, undoubtedly, that a bank is bound to honor the checks of its customer so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process, or are held under the bank's right of set-off. It is equally true that whenever money is placed in bank on deposit and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank upon paying the fund out on the depositor's check, will be free from liability even though it should afterwards turn out that the fund in reality belonged to someone else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person or to pay it to his order. If it be deposited by one as trustee, the depositor as trustee has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversations of its depositors who occupy some fiduciary relation to

the fund placed by them with the bank. In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable." In *Allen v. Puritan Trust Co.*, *supra*, the supreme court of Massachusetts said: "The principle governing the defendant's liability is, that a banker who knows that a fund on deposit with him is a trust fund can not appropriate that fund for his private benefit, * * * without being liable to refund the money if the appropriation is a breach of the trust."

Neither paragraph of the cross-complaint against appellant avers that the surety company has paid, or in any way satisfied the demand of the estate for the funds for which Perry failed to

4. account as administrator. Without such payment or satisfaction of the debt, the surety company can not avail itself of the equitable right of subrogation. Its claim is one of indemnity for loss sustained by reason of its having paid the debt for which appellant was primarily liable and which in equity and good conscience it should have discharged. The absence of such averments from the cross-complaint renders it insufficient. *Nelson v. McKee* (1913), 53 Ind. App. 344, 348, 99 N. E. 447, 101 N. E. 651; *Hinkle v.*

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Hinkle (1898), 20 Ind. App. 384, 389, 50 N. E. 829; *Christian v. Highlands* (1902), 32 Ind. App. 104, 111, 69 N. E. 266; *Gieseke v. Johnson* (1888), 115 Ind. 308, 309, 17 N. E. 573; *Howe v. White* (1904), 162 Ind. 74, 83, 69 N. E. 684; *Hunter v. First Nat. Bank* (1909), 172 Ind. 62, 67, 87 N. E. 734; *Barnes v. Sammons* (1891), 128 Ind. 596, 600, 27 N. E. 747; *Goodwin v. Davis* (1896), 15 Ind. App. 120, 122, 43 N. E. 881; *Pittsburgh, etc., R. Co. v. German Ins. Co.* (1909), 44 Ind. App. 268, 87 N. E. 995; *Fast v. State, ex rel.* (1915), 182 Ind. 606, 608, 107 N. E. 465; *Simmons v. Scarborough* (1907), 129 Ga. 125, 131.

The third paragraph of complaint is a suit upon the \$5,000 bond of the defaulting administrator. By this paragraph it is sought to hold appellant jointly liable as principal with John F. Perry, the defaulting administrator. The bank

5. did not execute the bond and is in no way liable on the contract. Appellant's liability, if it exists, is not based on contract, but arises from the tort in which it participated by the wrongful application and misuse of the trust funds deposited by Perry in the Miami County Bank. Under the facts found by the court, appellant may be held liable as a cotrustee of the trust funds deposited by Perry, but it became such trustee, *ex maleficio*, by its wrongful dealing with such trust fund and not otherwise. The first, second and third conclusions of law hold appellant liable *ex contractu*, on the bond, including a penalty authorized by statute against defaulting administrators in certain instances. §§2981, 2982 Burns 1914, §§2458, 2459 R. S. 1881. Conceding that the appellant is liable in tort for its wrongful dealing with the trust fund, it does not follow that it can be held jointly liable

with the administrator in a suit, *ex contractu*, upon the bond which it did not execute. The conclusions of law which hold appellant liable in this action as above shown are therefore erroneous. 1 Works' Practice §§317-327; *Coddington v. Canaday* (1901), 157 Ind. 243, 244, 61 N. E. 567; *Indianapolis, etc., R. Co. v. Ballard* (1864), 22 Ind. 448, 451; *United States Fidelity, etc., Co. v. Peoples Bank, supra*; *Cincinnati, etc., R. Co. v. Harris* (1878), 61 Ind. 290, 291; *Boyer v. Tiedeman* (1870), 34 Ind. 72; *Clark v. Lineberger* (1873), 44 Ind. 223. Misjoinder of causes of action is not of itself ground for reversal. §§279, 281 Burns 1914, §§278, 280 R. S. 1881; *Cargar v. Fee* (1895), 140 Ind. 572, 576, 39 N. E. 93; *Brown v. Bernhamer* 6. (1902), 159 Ind. 538, 540, 65 N. E. 580.

"It is not sufficient that the actions joined should be on money demands, or for the recovery of money. The demands must also arise out of contract. Therefore, an action to recover money for a tort can not be joined with one to recover on a demand arising out of contract. This was the rule before the code was enacted. And the code has not changed the rule." 1 Works' Practice §327, *supra*. "Giving the code its most liberal construction, it could hardly be claimed that it authorizes the joinder of two parties in one action, where the judgment against one must be for a tort and the other upon contract." 1 Works' Practice §317, *supra*. "The code has not abolished the distinction between actions sounding in tort and those sounding in contract; nor can causes of action of the two classes be joined." *Cincinnati, etc., R. Co. v. Harris, supra*.

The case at bar presents a question that goes beyond the misjoinder of causes of action where each cause is against the same parties, for it not

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only joins a suit upon a contract with a suit sounding in tort, but it seeks to hold appellant liable upon a contract to which it is not a party upon facts, that at most, only show a liability for a wrong which gives a right of action in no sense "arising out of contract".

Our conclusions already announced make it unnecessary to discuss the other questions considered in the briefs for the reason that they are in the main controlled by the principles above stated. The judgment is reversed with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 112 N. E. 40. As to liability of bank for knowingly permitting improper withdrawal of trust funds, see Ann. Cas. 1914 B 677; 12 Ann. Cas. 669. As to applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character in appended to his name, see 10 L. R. A. (N. S.) 706. As to liability of bank for taking deposit of trust funds in payment of trustee's debt, see 52 L. R. A. 790. See, also, under (1) 4 C. J. 525, 526; 3 Cyc 158; (2) 7 C. J. 633, 644; 5 Cyc 514, 520; (3) 7 C. J. 646; 5 Cyc 516; (4) 37 Cyc 406; (5) 9 Cyc 386; (6) 1 C. J. 1,086; 23 Cyc 415.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY v. COWAN.

[No. 8,926. Filed March 29, 1916.]

1. MASTER AND SERVANT.—*Employer's Liability Act.—Railroad Employes.*—The Employer's Liability Act of March 4, 1893 (§8017 Burns 1914, Acts 1893 p. 294), applies only to that class of railroad employes whose duties expose them to peculiar hazards incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby; hence an employe of a railroad company engaged to break coal at a dock, and who was injured in the course of his employment by the falling of the door of a standing dump coal car which was being unloaded, was not within the provisions of the act. p. 378.
2. MASTER AND SERVANT.—*Injuries to Railroad Employe.—Complaint.—Sufficiency.*—A complaint for injuries to an employe of a railroad company though claimed to state a cause of action

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under §8017 Burns 1914, Acts 1893 p. 294, is sufficient on demurrer if it states a cause of action either under the statute or at common-law. p. 381.

3. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Causal Connection.*—A complaint for injuries to a servant, to be good as a common-law action must show a causal connection between the negligence charged and the injury complained of. p. 381.
4. MASTER AND SERVANT.—*Injuries to Servant.—Unsafe Appliances.—Complaint.—Knowledge of Defect.*—A complaint to enforce the master's common-law liability for injuries to a servant, and based on the master's neglect with respect to safe appliances, or a safe place to work, must aver knowledge, actual or constructive, on the part of the master and want of knowledge on the part of the injured servant. p. 381.
5. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—As a general rule under the common law, the servant assumes the risk of defects or dangers of which he has knowledge or of which he could have had knowledge by the exercise of ordinary care. p. 381.
6. MASTER AND SERVANT.—*Injuries to Servant.—Fellow Servant.—Complaint.*—Under the common law, in a servant's action for personal injuries caused by the negligence of another in the employ of the common master, the complaint must show affirmatively that the negligent employe was not the fellow servant of plaintiff and it must appear that he was in the discharge of a duty which the master owed to plaintiff. p. 382.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by John M. Cowan against the Toledo, St. Louis and Western Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Charles G. Guenther, Braden Clark, Geddes Van Brunt and Clarence Brown, for appellant.

Forrest E. Livengood and Valentine E. Livengood, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor for \$450. The complaint is in one paragraph. A demurrer thereto for want of facts was overruled, and this ruling and the ruling of the court on appellant's motion for new trial are relied on for reversal and presented for our determi-

nation. Briefly stated, the allegations of the complaint are in substance, as follows: Appellant is a corporation and controls and operates a railroad running through Vermillion County, Indiana, and in the operation thereof owns a coal dock located about one mile east of the town of Cayuga in said county. On November 5, 1909, appellee was in the employ of appellant, working at said coal dock in breaking coal and such other work as he was ordered and directed to do by the engineer who had the control of the engine and the operation of the same at the coal dock. On said date, appellee was breaking coal that was being unloaded at the dock by means of trap doors in the bottom of the coal cars. The engineer in charge of the work was in the employ of appellant and was superintending and managing the work for appellant and appellee was subject to the orders and directions of such engineer and was required to obey his orders. Appellant carelessly and negligently permitted the chain which held up one of the trap doors to become and remain broken and defective, so that the door would not remain raised and fastened after coal was emptied from the car, and the engineer, whose duty it was to see that the car was in proper shape and the door closed, instructed and ordered appellee to get under the door and hold it up while he, the engineer, mended and repaired the broken chain. In compliance with the order, plaintiff got under the door and raised it up and held it until the engineer told him that it was all right and safe and that he could safely go to work, and under said instructions and orders and with the assurance of the engineer that the chain was fixed and the place safe, which he believed to be true, he proceeded with his work of breaking coal, when the defendant by its engineer carelessly

and negligently by some means broke "said wire and let said trap door fall upon him." Here follows a description of the nature and extent of appellee's injuries, etc.

It is insisted by appellant that the complaint does not state a cause of action under the second subdivision of the Employer's Liability Act

1. of March 4, 1893 (Acts 1893 p. 294, §8017 Burns 1914), because the allegations thereof show that plaintiff, at the time of injury, was not engaged in train service or exposed to the hazards of train operation; that it does not state a cause of action under the common law, (1) because it shows that appellee and appellant's foreman or engineer were fellow servants, and (2) because it fails to show that appellee did not assume the risk which resulted in his injury. Appellee, in effect, concedes appellant's contention that the complaint, to be sufficient under the second subdivision of the Employer's Liability Act, *supra*, must show that appellee's injuries resulted from a hazard incident to the use or operation of a train, but insists that it is sufficient under either the first subdivision, or the latter part of the fourth subdivision, of said act, and sufficient under the common law. Appellee relies on the cases of *Baltimore, etc. R. Co. v. Walker* (1908), 41 Ind. App. 588, 84 N. E. 730; *Cleveland, etc., R. Co. v. Beale* (1908), 42 Ind. App. 588, 86 N. E. 431; and *Indiana Union Traction Co. v. Long* (1911), 176 Ind. 532, 96 N. E. 604, as supporting his contention that his complaint is sufficient under the first subdivision of said act, and on the cases of *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 498, 60 N. E. 943; and on *Thacker v. Chicago, etc., R. Co.* (1902), 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792, that his complaint is good

under the latter part of the fourth subdivision of such act.

The two Appellate Court cases were decided since the decision in the case of *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, in which the Supreme Court first declared the act, *supra*, unconstitutional as to all corporations other than railroad corporations, but were decided before the more recent cases, hereinafter cited, which restrict the application of the statute as hereinafter indicated, and it seems that no question was raised in either of the Appellate Court cases as to the application of the statute and the court held the complaint sufficient thereunder. However, the result in those cases would have been the same whether the respective complaints therein being considered had been tested by the statute or the common law, because such subdivision of the statute does no more than reenact the common law on the subject involved. *Indiana Union Traction Co. v. Long, supra*. The case of *Indianapolis Union R. Co. v. Houlihan, supra*, which involved the sufficiency of a pleading under the second clause of the fourth subdivision of the act was decided before the case of *Bedford Quarries Co. v. Bough, supra*, and the later cases placed on such act the restricted construction. However, appellee could gain nothing in this case by having his complaint tested under such second clause of the fourth subdivision of the act because, as was said in *Thacker v. Chicago, etc., R. Co., supra*, cited by appellee, said clause of the act is not as broad as the common law and hence a complaint good under it would necessarily be good under the common law. It now seems to be settled that the benefits of the act, *supra*, are not to be extended to all railroad employes, or to any class of employes

other than "those whose duties expose them to the peculiar hazards incident to the use and operation of railroads". In other words, the act has been construed as designed exclusively for the benefit of those who are, in the course of their employment, exposed to the particular hazards incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby. *Richey v. Cleveland, etc., R. Co.* (1911), 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121; *Chicago, etc., R. Co. v. Lain* (1914), 181 Ind. 386, 394, 103 N. E. 847; *Indianapolis Traction, etc., Co. v. Kinney* (1909), 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711; *Cleveland, etc., R. Co. v. Foland* (1910), 174 Ind. 411, 91 N. E. 594, 92 N. E. 185. The Supreme Court held that this restricted construction was necessitated to prevent the act "from offending against the prohibition of our Constitution against special and class legislation." *Richey v. Cleveland, etc., R. Co., supra*. It follows that such construction applies to the act in its entirety, rather than to any particular subdivision thereof, as appellee's contention would imply.

Under the facts of this case, as shown by the complaint, appellee was employed to break coal at one of appellant's coal docks, and to do such other work as appellant's engineer might direct. While breaking coal, appellee was injured by a falling door on a dump coal car that was being unloaded at such coal dock. The engineer *by some means* broke the wire and let the door fall. When injured, appellee was doing nothing in connection with the operation of a train, nor did his injury result either directly or indirectly from any hazard incident to the operation of a train, switch engine, or the movement of any car on appellant's railroad. It follows, under the authorities cited,

that appellee has failed to state a cause of action under said statute. If, however, such complaint states facts sufficient to show a cause of action, either under the statute or common law, it must be held sufficient against demurrer. *Pitts-*

2. *burgh, etc., R. Co. v. Rogers* (1910), 45 Ind. App. 230, 87 N. E. 28. We therefore next

inquire whether such complaint states a cause of action under the common law. It charges

3. that appellant carelessly and negligently permitted the chain which held up the trap door to become and remain broken and defective, but there is no causal connection alleged, or shown, between such negligence and appellee's injury. On the contrary, the averments affirmatively show that appellant's engineer, with appellee's assistance, mended and repaired such chain.

4. Furthermore, if such causal connection were shown the complaint does not aver that appellee did not have knowledge of the broken and defective condition of the chain, but, on the contrary, it impliedly shows that he knew of its condition and assisted the engineer in repairing it. Where a cause of action is based on the master's neglect with respect to safe appliances, or a safe place to work, knowledge, actual or constructive, on the part of the master and want of knowledge on the part of the injured servant are essential averments. *Bennett v. Evansville, etc., R. Co.* (1912), 177 Ind. 463, 468, 470, 96 N. E. 700, 40 L. R. A. (N. S.) 963; *New Kentucky Coal Co. v. Albani* (1895), 12 Ind. App. 497, 40 N. E. 702; *Acme Bedford Stone Co. v. McPhetridge* (1905), 35 Ind. App. 79, 73 N. E. 835; *Creamery, etc., Mfg. Co. v. Hotsenpiller* (1900), 24 Ind. App. 122, 56 N. E. 250. While

it is the duty of the master to furnish safe
5. appliances, and a safe place to work, the servant nevertheless assumes the risk of

defects or dangers of which he has knowledge or of which he could have had knowledge by the exercise of ordinary care, except in certain cases, which for the purposes of this case, need not be noticed. *Lake Shore, etc., R. Co. v. Johnson* (1909), 172 Ind. 548, 88 N. E. 849; *Bennett v. Evansville, etc. R. Co. supra; Indianapolis, etc., Transit Co. v. Foreman* (1904), 162 Ind. 85, 69 N. E. 669, 102 Am. St. 185; *Chicago, etc., R. Co. v. Glover* (1900), 154 Ind. 584, 57 N. E. 244. There is no averment that such engineer negligently and carelessly repaired, or failed to repair, such chain and knowing that it was not repaired and made safe, he carelessly and negligently directed appellee to proceed with his work, giving him no knowledge or warning of the unsafe condition in which he, the engineer, had left such chain and, so far as the complaint shows, the engineer was warranted in assuring appellee that the defect in the chain had been fixed, and that "it was all right and safe and that he could safely go to work." Indeed, the complaint impliedly proceeds on the theory that such chain was in fact repaired and that, after repairing it and telling appellee that it was repaired, *appellant's engineer by some means broke "said wire and let said trap door fall,"* etc. What such wire had to do with the defective chain or the repair thereof, or with the trap door is not shown, except that when the engineer broke it the trap door fell and injured appellee. The breaking of such wire may have been, and apparently was an act in no way connected with repairing the chain.

"In an action at common law against a master to recover damages in favor of a servant caused by the negligence of another in the employ of the

6. common master, the complaint must show by affirmative averments that the negligent

employe was not the fellow servant of the person injured. To render a master liable in such a case it must appear that the negligent employe was in the discharge of a duty which the master owed to the injured servant." *Wallace v. Thompson* (1912), 49 Ind. App. 211, 216, 97 N. E. 26, and cases cited. The complaint under consideration does not show what the engineer was doing when he broke the wire in question. The averments may be sufficient to show that, in repairing the chain and in directing appellee, he was acting as and for the master, but an employe may act in a dual capacity, viz., as his master's representative and as his servant. *Southern Ind. R. Co. v. Harrell* (1904), 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Indiana Union Traction Co. v. Pring* (1908), 41 Ind. App. 247, 83 N. E. 733.

The controlling consideration in determining whether an employe in a given case was a vice principal in respect to the negligent act charged against him as resulting in injury to another employe of the common master is, not his comparative rank, not his authority to command, and not his authority to employ and discharge the servants working under him, but whether he was, at such time, a representative of the master performing a duty which the master could not delegate to another. *Southern Ind. R. Co. v. Harrell, supra*. Conceding that in repairing the chain, the engineer was doing the master's work, as before stated, it appears from the averments of the complaint that such work was completed before appellee was injured, and it is impossible for the court to know from such averments what such engineer was doing when he negligently broke the wire and let the door fall on appellee, which is the negligence alleged to have caused appellee's injury, and hence, it is

impossible for the court to know from such averments whether such engineer was at such time doing the master's work or a servant's work. For the reasons indicated, we are constrained to hold that the trial court erred in overruling the demurrer to the complaint.

The only remaining questions relate to the grounds of the motion for a new trial which challenge the verdict of the jury as not being sustained by sufficient evidence, and as being contrary to law. As these questions will not likely arise again we do not deem it necessary to consider them. For error in overruling appellant's demurrer to the complaint, the judgment is reversed with instructions to the court below to sustain said demurrer and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 112 N. E. 23. As to what is "accident arising out of and in course of employment" within Employer's Liability Act, see Ann. Cas. 1914 D 1284. As to constitutionality, application and effect of Federal Employer's Liability Act, see 47 L. R. A. (N. S.) 38; L. R. A. 1915 C 47. For a discussion of employee within meaning of statute abrogatory fellow servant doctrine as to employees of railroads, see 11 Ann. Cas. 924; 17 Ann. Cas. 514. See, also, under (1) 26 Cyc 1360; (3) 26 Cyc 1389; (4) 26 Cyc 1390, 1397, 1399; (5) 26 Cyc 1196; (6) 26 Cyc 1394.

COFFIN ET AL. v. PFAU ET AL.

[No. 9,429. Filed March 29, 1916.]

1. JUDGMENT.—*Revival*.—*Execution*.—Under §717 Burns 1914, §675 R. S. 1881, providing that after the lapse of ten years from the entry of judgment, or the issuing of an execution, an execution can be issued only upon leave of court, upon motion, upon ten days' personal notice to the adverse party, etc., it is not contemplated that the proceeding shall be commenced by a pleading in the nature of a complaint, but simply by a motion to be heard by the court in a summary way. p. 386.
2. APPEAL.—*Revival of Judgment*.—*Assignment of Errors*.—A motion for execution upon a judgment after the lapse of ten years

can not be made the basis for an assignment of errors challenging its sufficiency for want of facts. p. 387.

3. APPEAL.—*Assignment of Errors.—Joint Assignments.*—A joint assignment of errors, to present any question, must be founded upon a ruling against all of the appellants, and of which all of them have a right to complain. p. 387.

From Porter Circuit Court; *A. D. Bartholomew*, Judge.

Action by Pauline M. Pfau and another against Emma D. Coffin and others. From a judgment for plaintiffs, this appeal is prosecuted. *Affirmed.*

Knight & Brown and *Gavit & Hall*, for appellants.
Frank B. Pattee, for appellees.

MORAN, J.—Prior to June 29, 1899, a tract of land platted into lots as a part of Rolling View Addition to the town of Crown Point, Indiana, became the subject-matter of litigation as to the title and the validity of certain liens assessed against the same. As a result of the litigation, appellee Pauline M. Pfau recovered a judgment on the date mentioned in the sum of \$14,875.15, against the Aetna Iron and Steel Works, and a decree of foreclosure of a trust deed executed by it on the foregoing real estate to secure the payment of certain bonds held by appellee Pauline M. Pfau in the amount of said judgment. On November 6, 1911, appellee Pauline M. Pfau and J. Louis Pfau, her husband, brought a proceeding to revive the judgment and decree of foreclosure, and that an execution and order of sale be directed to the clerk of the Lake Circuit Court; the judgment and decree of foreclosure having been taken in the Porter Circuit Court where the cause had been venued, appellants contested the right of appellee to have the judgment and decree of foreclosure revived. On June 4, 1913, on issues being joined

and the cause submitted, judgment was entered in favor of appellees on conclusions of law rendered on facts specially found by the court. From this judgment, this appeal is prosecuted by appellants.

The errors relied on for reversal are: (1) The petition does not state facts sufficient to constitute a cause of action; (2) the petition does not state facts sufficient to authorize the court in granting any relief whatever; (3) overruling appellant's demurrer to appellee's petition; (3a) sustaining of appellee's demurrer to appellants' plea in abatement; (4) error in overruling appellants' motion for a new trial; and (5) error in stating each of the conclusions of law.

Appellees very earnestly insist that the state of the record is such that no questions are presented for review upon the merits of the cause for numerous reasons. It is insisted that certain named parties against whom judgment was rendered are not named as appellants, and that parties who were defendants to the petition, and against whom judgment was rendered, are named as appellees when they should be named as appellants. In this respect, there is much confusion in the record. It discloses two assignments of error. Some of the parties named as appellees in one assignment of error are named as appellants in the other. The conclusion we have reached, however, makes it unnecessary to pass upon this question.

The relief sought by appellees was statutory and so regarded by both parties. The statute relied upon provides that after the lapse

1. of ten years from the entry of judgment, or the issuing of an execution, an execution can be issued only upon leave of court, upon motion, upon ten days' personal notice to the

adverse party, etc. §717 Burns 1914, §675

2. R. S. 1881. It has been held that a pleading in the nature of a complaint is not contemplated by our practice under this statute; simply a motion to be heard by the court in a summary way, which can not be made the basis of an assignment of error as sought in this case. *Plough v. Reeves* (1870), 33 Ind. 181; *Jaseph v. Schnepfer* (1891), 1 Ind. App. 154, 27 N. E. 305; *Van Devanter v. Nixon* (1892), 5 Ind. App. 304, 31 N. E. 203. In *Conner v. Neff* (1891), 2 Ind. App. 364, 27 N. E. 645, Reinhard, J., speaking for the court made use of the following language: "The proceeding is in the nature of a *scire facias* to revive a judgment. Such a writ, at common law, issued only out of the court where the record was. The statute has not changed the rule. While the proceeding is for some purposes regarded as an action, it is not considered as a new suit, but the continuation of an old one."

As we have said, there are two assignments of error in the record, one of the same is copied into appellants' brief, and relied upon by

3. appellants to present the questions upon which they seek a reversal of this judgment. The assignment of errors discloses that eighteen appellants joined therein, and alleged that there was manifest error in the record. Specifications Nos. 3 and 3a of the assignment of errors refer to errors as made against a part of appellants only, and specifications Nos. 4 and 5, namely, error in overruling the motion for a new trial and error in stating each conclusion of law are made on behalf of all of the appellants, but are based on rulings made against a part of appellants only, who excepted thereto, that is, seven of appellants moved for a new trial, and excepted to the action of the

court in overruling the same. This is true likewise as to the exceptions taken to the conclusions of law rendered by the court upon the facts specially found. Neither of these specifications presents for consideration a review of the action of the trial court in the respect sought. It was necessary "that each paragraph or specification of error, in such joint assignment, should be founded upon a ruling against all appellants, and of which all of them had a right to complain, or it would not be good as to any of them." *Orten v. Tilden* (1887), 110 Ind. 131, 10 N. E. 936. See, also, *Boyd v. Pfeiffer* (1884), 95 Ind. 599; *Hinkle v. Shelley* (1885), 100 Ind. 88; *Robbins v. Magee* (1884), 96 Ind. 174; *Towell v. Hollweg* (1881), 81 Ind. 154; *Sparklin v. Wardens, etc.* (1889), 119 Ind. 535, 22 N. E. 8; *Arbuckle v. Swim* (1890), 123 Ind. 208, 24 N. E. 105; *Irey v. Mater* (1893), 134 Ind. 238, 33 N. E. 1018; *Medical College, etc. v. Commingore* (1895), 140 Ind. 296, 39 N. E. 744. A joint assignment of error is governed by the same rule as that of a complaint in the trial court, and must be good as to all who join in the same or will be good as to none. *Hayes v. Johnson* (1914), 56 Ind. App. 238, 105 N. E. 164; *Ditton v. Hart* (1911), 175 Ind. 181, 93 N. E. 961; *Orten v. Tilden, supra*.

Finding no available error presented by the record, judgment is affirmed.

PER CURIAM.—Since the decision of this cause on appeal, and within the term, it was made to appear that after its submission, and before decision here, appellee J. Louis Pfau died. It is therefore ordered that the judgment be affirmed as of the date of the submission of the cause.

NOTE.—Reported in 112 N. E. 21. As to revival of judgments, see 133 Am. St. 61. See; also, under (1) 17 Cyc 1028, 1030; 23 Cyc 1449; (2) 3 C. J. 1356; (3) 3 C. J. 1352; 2 Cyc 1003.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. LAMM.

[No. 8,824. Filed March 30, 1916.]

1. COURTS.—*Records.—Correction Nunc Pro Tunc.*—The minute on the court's bench docket, "instructions as given and refused filed," was a sufficient memorandum to authorize a correction of the record *nunc pro tunc* so as to affirmatively show that the instructions given and refused were filed. p. 301.
2. COURTS.—*Records.—Correction Nunc Pro Tunc.*—Though a party by mistake to his detriment had the clerk change his correct entry made from the court's minutes, he was not thereby precluded from the right to a correction *nunc pro tunc* to have the record speak the truth, in the absence of anyone having been misled. p. 391.
3. RAILROADS.—*Change of Grade.—Liability to Abutting Owners.*—Generally a railroad company may improve, repair, or change its roadbed, or raise or lower its grade, without liability to respond in damages to an abutting property owner, unless the change is made in a careless and negligent manner. p. 393.
4. PLEADING.—*Complaint.—Theory.*—When the theory of a complaint is clearly outlined, it must be sufficient on that theory when tested by demurrer. p. 395.
5. APPEAL.—*Review.—Theory of Complaint.*—Where the predominating theory of a complaint is uncertain, the court on appeal will follow the theory adopted in the trial court. p. 395.
6. RAILROADS.—*Change of Grade.—Damages from Negligent Work.—Complaint.*—Where the complaint, in an action for damages to plaintiff's property by the raising of defendant's railroad grade, alleged among other elements, that defendant built its embankment so that clay would wash therefrom onto the lawn of plaintiff, such allegation being so pleaded as to entitle plaintiff to recover therefor, and damages for such element being part of relief demanded, rendered the complaint good as against demurrer for want of facts. p. 396.
7. RAILROADS.—*Change of Grade.—Liability for Damages.*—Consequential, incidental and unavoidable annoyances, not the result of negligent or careless operation of a railroad, do not constitute an actionable nuisance; nor does increased inconvenience from noise, smoke and cinders, caused by the raising of a railroad grade, not due to improper construction or negligent operation, afford any ground for recovery. p. 397.
8. APPEAL.—*Prejudicial Error.—Incompetent Evidence.*—Incompetent evidence on a material matter is presumed to be harmful, unless the record shows the contrary. p. 398.
9. RAILROADS.—*Raising Grade.—Damages.—Evidence.*—Where the testimony of all the witnesses on the question of depreciation in

value of plaintiff's property, resulting from the raising of a railroad grade, included improper elements not separated from those which were proper, a verdict for the plaintiff could not be sustained. p. 399.

10. APPEAL.—*Review*.—*Unliquidated Damages*.—Where the damages sought to be recovered are unliquidated, the court on appeal can not sustain the judgment, in view of improper evidence on the question of damages, since to do so would be to assess the damages and is beyond the province of the court. p. 399.
11. RAILROADS.—*Construction*.—*Nuisance*.—*Damages*.—Where the nuisance from the construction of a railroad embankment, whereby clay is washed upon an abutting lawn, has been abated, the measure of damages is the diminution of the rental value of the property during the time the nuisance existed. p. 400.

From Miami Circuit Court; *Joseph N. Tillett*, Special Judge.

Action by Willis C. Lamm against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

G. E. Ross, for appellant.

Albert H. Cole, for appellee.

MORAN, J.—Appellee, whose property abuts upon appellant's right of way, recovered judgment for damages in the sum of \$500, claimed to have been suffered by reason of appellant's raising its railroad grade some twelve feet and constructing an additional track. In this appeal, which is from a judgment rendered on the verdict of a jury for the foregoing damages, appellant assigns as error the refusal of the court to grant appellant's petition to correct the record *nunc pro tunc*; the overruling of appellant's demurrer to the first and second paragraphs of complaint; and the overruling of appellant's motion for a new trial.

The order book entry does not affirmatively show that the instructions given and refused were

filed, and to cure this infirmity appellant

1. petitioned the trial court for an entry *nunc pro tunc*. The proceedings asking for this relief are regular, they show that the instructions were in fact filed, and the minute upon the court's bench docket, viz., "Instructions as given and refused filed," is a sufficient memorandum to authorize the granting of the application for a *nunc pro tunc* entry. Ewbanks' Manual (2d ed.) §214a; *Brittenham v. Robinson* (1899), 22 Ind. App. 536, 54 N. E. 433; *Perkins v. Hayward* (1892), 132 Ind. 95, 31 N. E. 670. The only objections

urged by appellee against the granting of

2. the relief sought by appellant for an entry *nunc pro tunc* is that appellant, through its counsel, caused the clerk to alter the entry as originally made in reference to the instructions, and that the infirmity in the record is not due to the mistake or misprision of the clerk, but due to appellant's counsel. There are instances where the litigant will be bound by an error which he invited the court to make. In the first instance, the clerk made an entry from the court's minutes, which virtually spoke the truth, and what is now being contended for by appellant; but afterwards, at the request of counsel for appellant, the same was altered by interlineation by the clerk, so as not in fact to speak the truth and to the detriment of the one suggesting the same to be made. This was not done by the sanction or authority of the court, but by a ministerial officer of the court, and evidently upon a mistaken notion of counsel as to what the entry should contain. No one was misled thereby. It is a principle of law that, "A party will be relieved against his own mistake and carelessness where no rights of third persons have intervened, but not where rights have been

lost, or money parted with, on the faith of the apparent facts, without fault of anybody, except the party seeking relief." *Gray v. Robinson* (1883), 90 Ind. 527. We are not impressed with the argument that, because the alteration was invited by the one now complaining, the record should not be made to speak the truth, and remain as it is. In *Security Co. v. Arbuckle* (1890), 123 Ind. 518, 24 N. E. 329, it was said: "It is the duty of the court to see that a correct minute is made on its order book of every step taken in any pending action." The court erred in refusing to direct the entry as prayed, and while this calls for a remanding of the cause, with directions to the lower court to instruct the clerk of the Miami Circuit Court to correct the entry *nunc pro tunc* as prayed, before proceeding further, however, the conclusion we have reached on the merits of the appeal, independent of the question sought to be presented under the correction of the record, make it unnecessary for us to remand the cause at this time for the express purpose of correcting the record.

The complaint is in two paragraphs, the material allegations of the first paragraph being that appellant is a corporation, operating a railroad which runs in an easterly and westerly direction, through the town of Amboy, Indiana, and that appellee's lots Nos. 38, 39, a part of 42 and 43 adjoin the right of way of appellant's railroad. . On lot 43 is a frame dwelling house used by appellee as a residence. Prior to October, 1909, appellee's property was well drained, and the view to the north across the town was unobstructed, and there was a free passage of air over the premises. No dirt, dust or cinders were thrown upon the premises, except such as were emitted from the locomotive, and the premises were desirable as a residence

and of great value. In 1909, pursuant to an ordinance passed by the town board, and a contract entered into between the town board and appellant, appellant lowered the grade of the streets and raised the grade of its roadbed by an embankment of yellow clay; in front of appellee's premises the embankment is twelve feet above the former level of its roadbed and twelve feet above the level of appellee's property. The base of the embankment has been widened by the washing down of yellow clay, which is being deposited on appellee's lawn and walks, and in the constructing of the embankment no drains were provided alongside the grade and the water falling on the same is cast with great force on appellee's lots, and flows under his house and becomes stagnant and endangers the health of appellee's family. The embankment is an unsightly structure, shuts off the view to appellee's house and prevents free access of the air and light. A great amount of dirt, dust and cinders, in addition to such as are emitted from the locomotive, are thrown upon appellee's premises; and the noise and vibration caused by the passing trains have greatly increased by reason of the elevation of the tracks. Appellee's property has been damaged in the sum of \$1,500 by being rendered undesirable as a residence. There is no material difference between the first and second paragraphs of the complaint. Both set forth a copy of the town ordinance and the contract entered into between appellant and the town.

It may be stated as a general proposition that a railroad company has the right to improve, repair or change its roadbed, raise or lower

3. its grade, when in its judgment to do so would increase its efficiency, without render-

ing itself liable to respond in damages to an abutting property owner, upon the theory that such improvement does not constitute an additional burden not included in the original appropriation; and is not liable unless such change is made in a careless and negligent manner. *Baltimore, etc., R. Co. v. Quillen* (1904), 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. 183; *Pittsburgh, etc., R. Co. v. Atkinson* (1912), 51 Ind. App. 315, 97 N. E. 353; *Egbert v. Lake Shore, etc., R. Co.* (1893), 6 Ind. App. 350, 33 N. E. 659.

Pursuant to an ordinance by the town of Amboy, appellant raised its roadbed and tracks through the town, and as a part of the ordinance a contract was entered into between appellant company and the town covering the manner in which the improvement was to be made, and among other things, it is provided that appellant was to pay all damages to property, which was caused by the proposed improvement, and to have due regard for the rights of individuals and corporations affected by the improvement or change incident thereto. As aforesaid, a copy of the ordinance and contract was filed with and made a part of each paragraph of complaint. It is appellee's contention that the action was based upon the ordinance and contract and by reason thereof, his right of recovery was enlarged over and above what it would have been under the common law. On the part of appellant, it is contended that there is nothing in the contract imposing a liability on it for the alleged injuries as set forth in the complaint, and that upon this theory the demurrer should have been sustained. The relief sought by appellee in both paragraphs of complaint was for damages to his real estate by reason of the change of the railroad grade. Many elements of damage are pleaded, growing

out of and as a result of the construction of the grade or embankment built by appellant, but as to whether a recovery is sought under the ordinance and contract, or independent of the same is not clear from the allegations of the complaint. In the admission of evidence, the court excluded as an element of damage testimony as to the injury alleged to have been caused by reason of the elevation of the road and the building of the embankment itself; the obstruction of appellee's view by reason thereof; and the prevention of the free circulation of air over appellee's premises, all of which were elements alleged in the complaint from which appellee suffered injury. And further, the record clearly discloses throughout the trial, that the court treated the action as based upon common-law liability, irrespective of the ordinance and contract. When the theory

4. of a complaint is apparent and clearly outlined, it must be sufficient upon that theory when tested by demurrer. *Carmel Nat. Gas, etc., Co. v. Small* (1898), 150 Ind. 427, 47 N. E. 11, 50 N. E. 476. Where, however, the predomi-

5. nating theory is uncertain, then the theory adopted by the trial court, and upon which the cause proceeded will be followed in the appellate tribunal. *Cleveland, etc., R. Co. v. DeBolt* (1894), 10 Ind. App. 174, 37 N. E. 737; *Southern R. Co. v. Jones* (1904), 33 Ind. App. 333, 71 N. E. 275; *Calloway v. Mellett* (1896), 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. 238. The facts pleaded in the case at bar are such as to be susceptible of more than one construction, and might be construed as proceeding upon different theories, hence the theory placed upon the complaint by the trial court will be followed by this court.

Among the several elements of damages alleged

is the element that the embankment was built some twelve feet above the level of what it had been and of appellee's lots, and so as to slope downward in close proximity to appellee's property, and that the embankment has been widened by the washing down of yellow clay out of which it was built until it has encroached upon appellee's premises, and the yellow clay has been carried over and upon appellee's premises and deposited upon his lawn and walks, which has rendered his premises undesirable as a residence. Under the facts in each paragraph of the complaint, this allegation is so pleaded as to entitle appellee to recover therefor, and being a part of the relief demanded the complaint is good as against a demurrer for want of facts. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 87 N. E. 25, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Sebienske v. Downey* (1911), 47 Ind. App. 214, 93 N. E. 1050; *United States Sav., etc., Co. v. Harris* (1895), 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *Linder v. Smith* (1892), 131 Ind. 147, 30 N. E. 1073; *Jessup v. Jessup* (1893), 7 Ind. App. 573, 34 N. E. 1017.

An unusual number of questions are presented by appellant under the error assigned on the overruling of the motion for a new trial, which relate principally to the admission of evidence and the instructions given to the jury. It is insisted that in the admission of evidence as to the injury, if any, to appellee's property, the court erroneously admitted evidence as to certain elements of damages, which should not have been taken into consideration in the class of cases to which the case at bar belongs. Three witnesses testified to the value of the property before the change of the grade and the construction of the embankment,

and likewise testified to the value after the change of the grade and the construction of the embankment. And in giving their opinions as to the value of the property after the change of the grade and the construction of the embankment the jury was told, over the objection of appellant, to take into consideration the fact, among other things, that the smoke, cinders, dust, and vibration caused by passing trains had been increased by reason of the change of the grade and the construction of the embankment. There is evidence in the record disclosing that after the improvement was made the smoke, cinders, dust and vibration caused by passing trains had increased. It is the law

7. that "consequential, incidental and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad from its nonnegligent and careful operation does not constitute an actionable nuisance," and does not constitute a taking or appropriation of property without due process of law or just compensation. And inconveniences caused by the railroad being constructed past one's premises as from noise, smoke and cinders, not due to improper construction or negligence in operating the same, furnish no ground for a recovery. *Fink v. Cleveland, etc., R. Co.* (1914), 181 Ind. 539, 105 N. E. 116; *Roman Catholic Church v. Pennsylvania R. Co.* (1913), 207 Fed. 897, 125 C. C. A. 629, L. R. A. 1915 E 623; *Hanlin v. Chicago, etc., R. Co.* (1884), 61 Wis. 515, 21 N. W. 623; *Boothby v. Androscoggin, etc., R. Co.* (1862), 51 Me. 318; *Beseman v. Pennsylvania R. Co.* (1888), 50 N. J. L. 235, 13 Atl. 164.

There is no contention on the part of appellee that the inconvenience and damage by reason of the noise, smoke, cinders, dust and vibration of

passing trains were caused either by the improper construction of the embankment or by the negligent operation of appellant's railroad; hence under the authorities there can be no recovery therefor. Treating the complaint as the trial court did on the theory of common-law liability, the following elements for which a recovery was sought remain: The flooding of appellee's premises in wet weather by reason of the destruction of a natural drain in the building of the embankment, the encroachment of the embankment on the premises, and the injury caused by the yellow clay being washed over and upon the premises. No witness testified as to the value of the premises after the change of the grade and the construction of the embankment, taking into consideration only the injury caused by the flooding of the premises with water and the encroachment of the embankment over and upon appellee's property and the washing down of the yellow clay thereon. Each witness that testified as to the value of the property before the change of the grade and the construction of the embankment testified that it was impossible to separate the elements of damage that they took into consideration in estimating the value of the property after the change of the grade and the construction of the embankment. The answer as to the value of the property after the improvement was made was responsive to the question propounded, and in the question dwells the infirmity.' Incompetent

8. evidence on a material matter is presumed to be harmful, unless the record shows the contrary. *Johnson v. Anderson* (1896), 143 Ind. 493, 42 N. E. 815; *Brackney v. Fogle* (1901), 156 Ind. 535, 60 N. E. 303.

The record discloses that appellee suffered damages by reason of the washing down of the yellow clay from the embankment over and upon 9. appellee's lot and under his house, and which gave forth an offensive odor. The witnesses being unable, however, to separate the amount of depreciation in value of the premises as to the elements for which a recovery could be had, it was, of course, impossible from this class of evidence for the jury to do so. In passing, it might be well to record the value that Elliott, J., placed upon opinion evidence as a means of estimating benefits and damages to real estate: "It is impossible to conceive that juries or courts can justly estimate benefits and damages without the aid of opinions of values from competent witnesses, unless, indeed, it be assumed that courts and juries have knowledge of the values of all kinds of property. If this assumption were just, then no doubt, all that would be needed would be an accurate description of the property; but every one knows that in the very great majority of cases neither courts nor juries possess such knowledge as would enable them, unaided by opinions, to affix just values to property." *Yost v. Conroy* (1884), 92 Ind. 464, 47 Am. Rep. 156. The damages sought to be recovered are unliquidated, and an 10. affirmance of the judgment under the circumstances would virtually mean an assessment of the damages by this court, which is not within our province. *Monongahela River, etc., Co. v. Hardsaw* (1907), 169 Ind. 147, 81 N. E. 492; *Indianapolis, etc., R. Co. v. Hill* (1909), 172 Ind. 402, 86 N. E. 414.

Further, it is insisted that the record discloses that appellant sodded the banks of the grade so as

to abate the nuisance. If the nuisance has
11. been abated, then the diminution of the
rental value of the property during the time the
nuisance existed would be the proper measure of
appellee's damages. It was held in the case of
Watts v. Norfolk, etc., R. Co. (1894), 39 W. Va.
196, 19 S. E. 521, 45 Am. St. 894, 23 L. R. A. 674,
the court adopting the language of a former deci-
sion, "where the cause of the injury is in its nature
permanent, and a recovery for such injury would
confer a license on the defendant to continue the
cause, the entire damage may be recovered in a
single action." And in the case of *Cleveland, etc.,
R. Co. v. King* (1900), 23 Ind. App. 573, 55 N. E.
875, it was said, "Where the wrong constituting
the nuisance is not permanent, but may be dis-
continued, the measure of damages is not the
depreciation in value of the property." The
nature of the question thus far disposed of and
the conclusion reached makes it unnecessary to
determine whether the injury for which a recovery
was sought was of a temporary or permanent
character, as the infirmity of the record contended
for in this respect is not likely to occur on a retrial
of the cause.

Judgment reversed and cause remanded to the
lower court with instructions to correct the record
nunc pro tunc as prayed for, and to grant appellant
a new trial; and for further proceedings consistent
with this opinion.

NOTE.—Reported in 112 N. E. 45. As to power of court to make
nunc pro tunc entries, see 4 Am. St. 828. As to liability of railroad
company to abutting owner for damages from change of grade of
highway necessary to carry it across tracks, see 26 L. R. A. (N. S.)
226. See, also, under (1) 11 Cyc 764, 765; (2) 11 Cyc 764; (3) 33 Cyc
355; (4) 31 Cyc 116; (5) 3 C. J. 725; 2 Cyc 672; (6) 33 Cyc 368; (7)
33 Cyc 353; (8) 4 C. J. 912; 3 Cyc 368; (9) 33 Cyc 372, 373, 376;
(10) 4 C. J. 1139; 3 Cyc 436, 439; (11) 29 Cyc 1274.

CONTINENTAL INSURANCE COMPANY v. SMITH ET AL.

[No. 8,830. Filed March 31, 1916.]

INSURANCE.—Fire Insurance.—Alienation of Property.—Liability on Premium Note.—Where the assured under a fire policy paid the first annual premium in cash and executed notes for succeeding years of the policy term, and prior to the expiration of the first year sold the property covered and tendered back the policy for cancellation, he was not liable on the premium notes; it appearing that the cash premium was more than the short rate for the time the policy had been in force, and that the policy by its terms became void on a transfer of the property.

From Superior Court of Marion County (90,918);
Pliny W. Bartholomew, Judge.

Action by the Continental Insurance Company against George D. Smith and another. From a judgment for defendants, the plaintiff appeals.
Affirmed.

Headrick & Ruick, for appellant.

Newton J. McGuire, for appellees.

IBACH, C. J.—Appellant sued appellees on a promissory note executed by them to appellant, in payment of premiums in four yearly installments on a policy of fire insurance. This appeal is from a judgment against appellant, and the error assigned is the overruling of its motion for new trial on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law.

It appeared from the evidence that the first installment of the premium on a five-year insurance policy had been paid; that the note in suit was executed for the four remaining installments; that six months after the execution of the policy, the property was sold by appellees; that by its terms the policy became void when the property insured was transferred; that on selling the prop-

erty, appellees tendered back the policy for cancellation; that the first installment of premium which had been paid was more than the short rate for the time the policy had been in force. The leading case on which appellant relies is *American Ins. Co. v. Henley* (1878), 60 Ind. 515. That case holds that liability on such a note as that here involved is not affected by the fact that the policy, as in the present case, provides that the insurer shall not be liable for any loss which occurs while any premium obligation remains due and unpaid. The reason assigned for the holding is that the policy, even though liability on it became suspended for nonpayment of premiums when due, would again become effective on payment of the past due premium.

In the present case there could, in no event, be a right to recover more than the earned portion of the premium. Appellant could not have recovered for the insurance after the transfer of the property which avoided the policy. After that the policy could not again come into force. It was said in the case of *American Ins. Co. v. Henley*, *supra*, 521: "This is not a case of alienation of the property insured, but simply a failure to pay an instalment due on a premium note. Alienation, as a general rule, invalidates a policy, whether it is so provided in the policy or not, because it terminates all interest of the assured therein; whereupon the policy becomes inoperative, and ceases to have any validity as an indemnifying contract." The policy, by its terms, provides that it shall become void on any transfer of the property except by succession. It also provides for cancellation by the insurer at any time upon returning the unearned portion of the premium, and provides for cancellation by the insured when the premiums are paid, and the return

by the insurer of the premium above the customary short rate. Since the testimony of appellant's agents shows that appellees had already paid more than the short rate for the time the policy was in force, there was no occasion for them to offer to pay a larger amount to appellant before the policy could be cancelled. If they had done so, appellant would have been compelled to return it to them. The law does not require the doing of a useless thing. Appellees had done all that was required of them to bring about a cancellation of the policy and note, the policy by its terms had become void, there was no right to recover on the note, and the court did not err in its judgment and finding. See also *Ohio Farmers Ins. Co. v. Hunter* (1906), 38 Ind. App. 11, 77 N. E. 951.

In view of the conclusion which we have reached in the matter, it is unnecessary to consider whether appellant was bound by the representations of the agent who took the application that he would cancel it, if appellees should sell the property soon, as they contemplated doing. Judgment affirmed.

NOTE.—Reported in 112 N. E. 15. See 19 Cyc 616.

SIMMONS v. PARKER ET AL.

[No. 8,920. Filed March 31, 1916.]

1. APPEAL.—*Review.—Demurrer to Complaint.—Action Prematurely Brought.*—The sustaining of a demurrer to a complaint was not error, where it affirmatively appeared that the action was prematurely commenced. p. 406.
2. APPEAL.—*Review.—Evidence.—Findings.*—Where the evidence showed that in an exchange of real estate one of the parties to the trade agreed to execute a mortgage to the other to secure the latter on account of assuming an indebtedness of the former on property transferred, upon condition that certain property, which the party agreeing to execute the mortgage had not seen, should on investigation prove to be as represented in the negotiations, the court

was warranted in finding that the promise to execute the mortgage and to pay the sum secured thereby was conditional rather than absolute; and in view of further evidence that on investigation the property as to which the representations were made proved to be materially different in value and title than as represented, a finding of the nonexistence of a promise to pay was also warranted. p. 411.

3. MORTGAGES.—*Delivery.—Evidence.*—Where there was evidence to show that at the time of effecting an exchange of real estate, there was an agreement by one of the parties to execute a mortgage on condition that subsequent investigation should prove that property received by him was as represented in the negotiations, and that thereafter, while the wife of such party was away investigating the property such party executed a note and mortgage and placed it in the hands of the other party for the purpose of procuring the signature of the mortgagor's wife in case the property investigation proved satisfactory, such delivery did not constitute a delivery of the mortgage, and the mortgagee could base no right thereon as against the mortgagor or his wife. p. 412.
4. MORTGAGES.—*Delivery.—Validity.*—To constitute a valid delivery of a mortgage, the act must combine with an intent to that end. p. 412.
5. HUSBAND AND WIFE.—*Mortgages.—Nonjoinder of Wife.—Extent of Lien.*—Where a husband takes title to real estate in his own name and executes a mortgage thereon to secure the payment of the purchase money, such mortgage is a valid lien upon the entire title, and the wife has no interest inchoate or otherwise as against the mortgage regardless of whether she joins in its execution; but as a general rule a mortgage by the husband alone on lands held by the entireties, to secure the payment of his individual debt, can not be established as a lien against such land or enforced against either him or his wife. p. 413.
6. VENDOR AND PURCHASER.—*Vendor's Lien.—Taking of Mortgage.*—The taking of a mortgage by the vendor on property sold to husband and wife by the entireties, though invalid because signed by the husband alone and without the wife's knowledge or consent, indicated a purpose not to waive any lien growing out of the transaction, and was therefor not inconsistent with the existence of a vendor's lien. p. 415.
7. VENDOR AND PURCHASER.—*Vendor's Lien.—Establishment Against Lands in Hands of Wife.*—Where a husband purchases land, and executes his own note for the purchase price, which note remains unpaid, and causes the land to be conveyed to his wife, who pays no consideration therefor, the wife is a mere volunteer and the vendor may establish a lien against the land; and he may also establish such lien where the wife pays the purchase price in part and the husband executes his note for the balance. p. 415.

8. **VENDOR AND PURCHASER.—Vendor's Lien.**—The technical relation of vendor and vendee is not necessary to the existence of a vendor's lien. p. 415.
9. **HUSBAND AND WIFE.—Tenancy by Entireties.**—A tenant by the entireties owns merely the entire estate, and, if owned in fee, such an estate is not greater in quantity than any other estate in fee. p. 416.
10. **VENDOR AND PURCHASER.—Vendor's Lien.—Enforcement Against Tenants by Entireties.**—Where a husband and wife took title to land by the entireties, the wife being a purchaser for value, and it was distinctly understood between the parties that no indebtedness should arise against either the husband or wife on account of such transaction, except on condition that certain other property acquired should on investigation prove to be as represented by the grantor, and pending such investigation by the wife the husband alone executed a note and also a mortgage on the property held by the entireties, which he delivered to the grantor to be signed by the wife in the event the investigation proved to be satisfactory, and the condition failed by reason of such other property not being as represented, neither the husband nor the wife owed any debt and no vendor's lien arose as against the property held by the entireties. p. 416.
11. **MORTGAGES.—Assignments.—Vendor's Lien.—Estoppel.**—While a mortgage lien will pass by assignment of the mortgage, and a vendor's lien, being a mere incident of the debt, will pass by assignment of a purchase money note, grantees who held by the entireties were not estopped from contesting the existence of a lien upon either theory as against the assignee of a mortgage and not purporting to be for an unpaid portion of the purchase price, and which were executed by one of the grantees without the other's knowledge and consent, and contrary to an express understanding between the grantor and grantees that no indebtedness whatever should arise against either of the grantees by reason of the conveyance, except upon the fulfillment of a certain condition which never materialized; and especially in view of the fact that such assignee was an assignee with notice. p. 417.
12. **MORTGAGES.—Assignment.—Notice of Infirmary.**—Where the attention of the assignee of a purported purchase money note and mortgage was specifically directed to the fact that the name of both husband and wife appeared in the body of the mortgage, which was signed by the husband alone, and he was informed that they held title by the entireties to the premises described, which fact was also disclosed by the deed record, and it appeared that he also knew that the wife had refused to sign the mortgage because of certain misrepresentations of the grantor, such assignee was charged with the duty of inquiry. p. 417.
13. **MORTGAGES.—Vendor's Lien.—Rights of Subsequent Grantee.**—Although the facts were sufficient to place a subsequent grantee

on inquiry as to a supposed mortgage and vendor's lien against the property, he was not precluded from having his title quieted against one asserting such liens, even though he made no such inquiry, where inquiry if made would have disclosed the non-existence of the alleged liens. p. 418.

From Marion Circuit Court (21,075); *Charles Remster*, Judge.

Action by John B. Simmons against Clint Parker and others. From the judgment rendered, the plaintiff appeals. *Affirmed.*

Robinson, Symmes & Marsh, for appellant.

Emsley W. Johnson and Joseph W. Hutchinson, for appellees.

CALDWELL, J.—Appellant filed his complaint in two paragraphs. In each he declared on a promissory note, alleged to have been executed by appellee Benjamin F. Meyers, and endorsed by appellees Kuntz and Kuntz. In each paragraph he prayed a personal judgment against appellees, Benjamin F. Meyers and Julia A. Meyers, his wife, and Martin J. Kuntz and Elizabeth M. Kuntz, his wife. By the first paragraph, he sought also to foreclose against certain real estate owned by appellee, Clint Parker, a mortgage alleged to have been executed by Benjamin F. Meyers to secure the note. By the second paragraph, in addition to a personal judgment as aforesaid, he sought to have declared and enforced against such real estate a vendor's lien in the amount of the note. The demurrer of each appellee to each paragraph of the complaint was sustained. In

such ruling there was no error, as each
1. paragraph disclosed affirmatively that the action was prematurely commenced. The note by its terms matured December 26, 1912, while the action was commenced March 28,

1912. *Indianapolis, etc., R. Co. v. First Nat. Bank* (1893), 134 Ind. 127, 33 N. E. 679; *Walter A. Wood, etc., Co. v. Caldwell* (1876), 54 Ind. 270, 23 Am. Rep. 641; *Middaugh v. Wilson* (1902), 30 Ind. App. 112, 65 N. E. 555; *Norris v. Scott* (1892), 6 Ind. App. 18, 32 N. E. 103, 865; *American, etc., Trust Co. v. Gibson County* (1906), 145 Fed. 871, 76 C. C. A. 155, 7 Ann. Cas. 522; 1 R. C. L. 341, 1 C. J. 1152; 31 Cyc 291.

Appellees Clint Parker and Hattie F. Parker, his wife, filed a cross-complaint, whereby they sought to quiet their title to a certain lot No. 15 in Beech Grove, Marion County, Indiana, being the real estate described in the mortgage, against all claims of appellant and coappellees thereto. Appellees Meyers and Meyers disclaimed. Appellant answered in general denial and filed also certain paragraphs which he designated cross-complaints, whereby he brought to the attention of the court the same facts as pleaded in his complaint, and prayed as affirmative relief that the lien of said mortgage and in the alternative that a vendor's lien in the amount of the note be declared and established against the real estate. The issues being closed by general denials, the cause was tried by the court without a jury, resulting in a judgment and decree quieting title in appellee Clint Parker, against all claims of appellant and appellees Meyers and Meyers and Kuntz and Kuntz.

If there is evidence to sustain the decision in its material aspects, under the rule that governs on appeal, this cause must be affirmed. The evidence in some respects is contradictory. As tending to support the decision, it is in substance as follows: December 26, 1910, Kuntz and Kuntz were the owners of the real estate described in

the cross-complaint and also of two other tracts situated in Beech Grove, and one tract in Hartsville, and they claimed to own a residence property in Marion, Indiana. At the same time, Meyers owned an 80-acre farm in Michigan, and held also of Patterson M. Hearn a contract to purchase a 90-acre farm situate in Bartholomew County, the deed to be made on the payment of \$475, the balance of the purchase price. Appellee, Julia A. Meyers owned an 80-acre farm in Bartholomew County. Each of these parcels of real estate was encumbered. On said day Kuntz and Kuntz executed their deeds, by which they conveyed to Meyers and Meyers by entireties the above five tracts of land owned by the former, in consideration of which the latter conveyed to the former the Michigan farm and Mrs. Meyers' Bartholomew County farm, and also procured Hearn to convey to Kuntz and Kuntz the 90-acre Bartholomew County farm. To procure the last named conveyance to be made, Kuntz and Kuntz executed to Hearn a mortgage on the 90-acre farm, to secure the payment of the \$475 due the latter from Meyers. There is conflict in the evidence as to the circumstances under which Kuntz and Kuntz assumed and agreed to pay the \$475 to Hearn. On this subject there was evidence to the following effect: Meyers and Meyers had not seen the Marion residence property prior to the trade. There was evidence that Kuntz represented it to them as an eight-room residence property in good condition, rented at \$10 per month, worth \$3,000, with no encumbrance except a \$750 mortgage, with thirty months to run; that since Meyers and Meyers had not inspected this property, Mrs. Meyers should have the privilege of doing so, and that if she found it as represented, she and her husband were to

execute to Kuntz and Kuntz a note for \$475, secured by mortgage on lot 15, described in the cross-complaint; that if the Marion property was not found to be as represented, no note or mortgage should be given. Kuntz testified that he had never seen the Marion residence property, and that he had no knowledge of its condition or title, except as represented to him by the person from whom he purchased it three months before he traded it to Meyers and Meyers.

The evidence is without contradiction that Mrs. Meyers refused to sign the note and mortgage until she had inspected the Marion property. Early in January, Kuntz called on Meyers and Meyers at their home in Bartholomew County for the purpose of procuring the execution of these instruments. Mrs. Meyers, however, had not made her trip to Marion. The note and mortgage therefore were not executed. She went to Marion in the latter part of January. While she was absent, Kuntz again called on Meyers. At this time Meyers signed the note and signed and acknowledged the mortgage. The latter bears date of January 28, 1911. The note, however, is dated December 26, 1910, it having been antedated. There was evidence that, to procure Meyers to sign the instruments, Kuntz made further representations respecting the Marion property. Meyers informed Kuntz that Mrs. Meyers intended to stop at the Kuntz home in Beech Grove as she was returning from Marion, and that she at that time would sign the note and mortgage if the Marion property was found to be as represented. Apparently for such purpose, the instruments were delivered into the possession of Kuntz. There was uncontradicted evidence that Mrs. Meyers found the Marion property to be in

a dilapidated condition; that it had been tenantless for three years; that it had been sold on mortgage foreclosure, and that the year for redemption had about expired. Mrs. Meyers as she returned from Marion stopped at the Kuntz home, but under the circumstances she refused to sign the note and mortgage. Kuntz testified that she gave as an additional reason that there was some misunderstanding between her and her husband respecting property rights. The note signed by Meyers bears date of December 26, 1910, due in two years, principal \$475, with interest at 6 per cent payable to Martin J. Kuntz and Elizabeth M. Kuntz, signed only by Benjamin F. Meyers. The mortgage designates Meyers and Meyers, husband and wife, as mortgagors, and Kuntz and Kuntz as mortgagees, describes said lot 15 as the real estate mortgaged to secure the note above described. It shows on its face that it was signed and acknowledged by Benjamin F. Meyers alone, under date of January 28, 1911. It was duly recorded May 6, 1911. Kuntz and Kuntz endorsed the note to appellee August 10, 1911. By a writing on the mortgage, acknowledged September 9, 1911, and duly recorded October 25, 1911, they transferred the mortgage to appellant. There was evidence that appellant paid full value for the note and mortgage.

In the transaction by which the note and mortgage were transferred to appellant, his attention was directed to the fact that Mrs. Meyers had not signed them. He was informed that the title to lot 15 was held by Meyers and Meyers as husband and wife, and that Mrs. Meyers had refused to sign the note and mortgage, because the Marion property was not as represented. Kuntz said to him, however, that the note represented a part of

the unpaid purchase price of the lot. By a deed executed August 25, 1911, and recorded August 26, 1911, Meyers and Meyers conveyed lot 15 to appellee Clint Parker. Prior to accepting this conveyance, Parker caused the title to the lot to be abstracted. The abstracter overlooked the mortgage mentioned above, and as a consequence, the abstract did not show its existence. Parker had no actual knowledge that there was such a mortgage, or that there was any part of the purchase price of the lot unpaid. He had only such constructive notice as the records of the recorder's office afforded him. From the fact of such records, he stood charged with constructive notice that there was such a mortgage; that it had been executed by Benjamin F. Meyers; that it had not been executed by Mrs. Meyers, and that the real estate described in the mortgage was held and owned by the former and his wife as tenants by the entirety.

Proceeding to a consideration of the sufficiency of this evidence, it appears that, in order that the respective conveyances might be consum-

2. mated, it was necessary that Hearn be paid the amount due him from Meyers. To that end, Kuntz assumed such indebtedness and secured it by a mortgage on the 90-acre farm, and subsequently paid it. Under such circumstances, if Meyers and wife agreed to pay Kuntz and wife an equal amount, the debt thereby created represents an unpaid balance of the purchase price of the tracts of real estate conveyed to Meyers and wife, including lot 15. The court, however, was warranted in finding that the promise of Meyers and wife to pay such sum, and to secure it by note and mortgage was conditional rather than absolute. There was evidence that said sum was

to be secured and paid only in case the Marion property proved on inspection to be as represented. The testimony of Mrs. Meyers was emphatic to that effect. She is corroborated by Meyers and also by the circumstance that the note and mortgage were not required to be executed at the time of the execution of the deeds. As we have said, the uncontradicted evidence established that the condition upon which the note and mortgage were to be executed failed, in that the Marion property proved to be materially different in value and title from as represented, and in fact proved to be practically worthless. It follows that the court was warranted in finding the nonexistence of a promise to pay on the part of Meyers and

3. wife. True, Meyers signed the instruments, but the evidence is sufficient to support a finding that they were not delivered. There was evidence that Meyers placed such instruments

4. in the possession of Kuntz only for the purpose of procuring Mrs. Meyers' signature thereto, in case the Marion property was found to be as represented. Meyers testified that he signed the instruments and surrendered them to Kuntz "on condition if everything was satisfactory when we looked at that Marion property". To constitute a valid delivery of an instrument, an act must combine with an intent to that end. There was evidence that the element of intent did not exist. *Stokes v. Anderson* (1889), 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313, note; *Goodwin v. Owen* (1876), 55 Ind. 243. In such view of the case, Kuntz and Kuntz could have based no right on the instruments as against either Meyers or his wife.

But since Kuntz and Kuntz paid Meyers' debt to Hearn, if we should assume as argued that Meyers in consideration thereof executed the note as a

binding obligation and likewise the mortgage for the purpose of securing its payment, a question is presented respecting the rights of the parties while Kuntz and Kuntz still held the instruments, and Meyers and wife yet held the title to lot 15. Where

a husband purchases real estate, taking the

5. title in his own name, and executes a mortgage on such real estate to secure the payment of the purchase money or a part thereof, such mortgage is a valid lien upon the entire title and the wife has no interest inchoate or otherwise in such real estate as against the mortgage and regardless of whether she joins in its execution. §3033 Burns 1914, §2495 R. S. 1881; *Denton v. Arnold* (1898), 151 Ind. 188, 193, 51 N. E. 240; *Fowler v. Maus* (1895), 141 Ind. 47, 40 N. E. 56; *Bowman v. Mitchell* (1884), 97 Ind. 155, 157; *Baker v. McCune* (1882), 82 Ind. 339; *Seibert v. Todd* (1889), 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606, note. The lands here, however, were purchased by Meyers and his wife, and title taken by entireties. The debt paid by Kuntz to Hearn, was a debt of Meyers' alone. An obligation against Mrs. Meyers could not grow out of the payment of such debt in the absence of a promise on her part to that end, and there was no such promise. If Meyers executed the note here, in consideration of the payment by Kuntz to Hearn, such note was not only his individual obligation, but also it represented his individual debt. The mortgage was executed to secure the payment of the note. It is a general rule that a mortgage executed by a husband alone on lands held by entireties, to secure the payment of his individual debt may not be established as a lien against such land or enforced against either him or his wife. *Thornburg v. Wiggins* (1893), 135 Ind. 178, 34

N. E. 999, 41 Am. St. 422, 22 L. R. A. 42; *Chandler v. Cheney* (1871), 37 Ind. 391. The rule is the same where the wife joins in the execution of the mortgage. *Dodge v. Kinzy* (1885), 101 Ind. 102; *Abicht v. Searls* (1900), 154 Ind. 594, 57 N. E. 246; *Davis v. Neighbors* (1905), 34 Ind. App. 441, 73 N. E. 151. Mrs Meyers was not a mere volunteer in the transaction involved here. In addition to releasing her inchoate interest in her husband's lands, she parted with title to her own farm in consideration of the conveyance to her and her husband by entirety. Neither can it be said that she was a purchaser with notice of the existence of the note and mortgage. These instruments were not in existence at the time of such conveyances. As we have said, there was substantial evidence that their future execution depended on a condition which failed. She did nothing at any time to validate the instruments. Under such circumstances, we are not required to pass on the suggested question of whether a mortgage executed by the husband alone on lands purchased by the husband to secure the payment of his debt representing the unpaid purchase price of such land, may be enforced against such lands, where, at the request of the husband, they are conveyed by the vendor to himself and wife as tenants by the entirety, the wife being a mere volunteer, with notice of the facts. In such a case, however, the execution of the deed and mortgage being parts of the same transaction, the equities of the situation would seem to require that such a mortgage be enforced although the wife was not a party to it, and therefore did not subscribe to its specific terms. Under the circumstances of the case at bar, however, it is our judgment that the mortgage here was without effect as against Mrs. Meyers,

and hence that it was nonenforceable by Kuntz and Kuntz as against lot 15, while the title thereto was held by her and her husband. She took title to such lot with the distinct understanding that such a mortgage should not be executed by her or her husband unless the Marion property proved to be as represented. It was shown to be otherwise by uncontradicted evidence.

Turning our attention to the vendor's lien phase of the case, the mortgage here was, as we have held, without legal validity. The fact that

6. it was taken indicated a purpose not to waive whatever lien, if any, grew out of the transaction. The taking of the mortgage therefore is not inconsistent with the existence of a vendor's lien. *Scott v. Edgar* (1902), 159 Ind. 38, 63 N. E. 452; *Gilbert v. Bakes* (1886), 106 Ind. 558, 7 N. E. 257; *Bakes v. Gilbert* (1884), 93 Ind. 70; *Hines v. Langley* (1882), 85 Ind. 77; *Fouch v. Wilson* (1877), 60 Ind. 64, 28 Am. Rep. 651. Where

a husband purchases land, and executes
7. his own note for the purchase price, which note remains unpaid, and causes the land to be conveyed to his wife, who pays no consideration therefor, the vendor may establish a lien against the land, the wife being a mere volunteer. *Strohn v. Good* (1888), 113 Ind. 93, 14 N. E. 901; *Humphrey v. Thorn* (1878), 63 Ind. 296; *Martin v. Cauble* (1880), 72 Ind. 67, 74. The rule is the same where the wife pays the purchase price in part, and the husband executes his note for the balance. *Scott v. Edgar, supra*; *Anderson v. Tannehill* (1873), 42 Ind. 141. The technical relation of vendor and vendee is not necessary to

8. the creating and existence of the lien in favor of one party against the lands of another. *Barrett v. Lewis* (1886), 106 Ind. 120,

5 N. E. 910; *John v. Sewell* (1870), 33 Ind. 1; *Fleece v. Orear* (1882), 83 Ind. 200; *Dwenger v. Branigan* (1884), 95 Ind. 221. "A vendor's lien is an ancient rule, and had its origin in the principle of natural justice and equity, which impresses the conscience that it is not fair for a vendee of lands, who gives no other security, to have, as between the parties, the absolute estate until he has fully paid for it. It rests upon the same foundation as the doctrine of subrogation. * * * It is created by the law solely to secure the payment of the purchase money. It is therefore an incident of the debt. * * * And continues to exist until the debt is paid or otherwise discharged." *Cassell v. Lowry* (1904), 164 Ind. 1, 72 N. E. 640.

9. A tenant by the entireties owns merely the entire estate. If owned in fee, such an estate is not greater in quantity than any other estate in fee. As argued, it would, therefore, seem to follow as a natural sequence from the foregoing principles, that where lands are purchased and conveyed to a husband and wife as tenants by the entireties, and the husband executes his note for the purchase price, which note remains unpaid, or where the wife pays a part of the consideration for the conveyance, and the husband executes his note for the balance thereof, which balance remains unpaid, and where in the latter case the wife at the time of the conveyance has or is chargeable with knowledge of the facts, the vendor may enforce his lien against the lands.

In the case at bar, however, the facts which destroy the apparent lien of the mortgage against lot 15, likewise stand as a barrier to the

10. decreeing of a vendor's lien against such lot, based on the note and its nonpayment.

Mrs. Meyers was a purchaser for value. As we

have indicated, there was substantial evidence that she with her husband took title by entireties to lot 15, with the distinct agreement with Kuntz and wife that no indebtedness should arise against either of them, and that no note should be executed by reason of the payment of the Hearn claim, except on a condition which failed. Neither she, therefore, nor her husband, owed any debt. It follows that the lien could not arise or be created on said lot, based on the voluntary act of the husband in executing the note, if he did execute it. We conclude, therefore, that prior to their conveyance thereof, Mrs. Meyers and her husband held said lot free from any lien in favor of Kuntz and Kuntz, as the holders of said note. The lien of the mortgage, if it constituted a lien, passed

11. to appellant with its assignment. Likewise the vendor's lien, if it existed, being a mere incident of the debt, passed with the assignment of the note. *Smith v. Mills* (1896), 145 Ind. 334, 43 N. E. 564, 44 N. E. 362; *Mulky v. Karsell* (1903), 31 Ind. App. 595, 68 N. E. 689. We have held, however, that in neither case was there a lien. The facts were not sufficient to estop Meyers and wife from contesting the existence of a lien on either theory as against appellant, while they owned the lot. Moreover, if the facts were otherwise sufficient to that end, appellant was an assignee with notice. As we have said, his attention was specifically directed to the fact that Meyers

12. and wife, as husband and wife, were named in the body of the mortgage as mortgagors, and that the wife had not signed it. He was informed also that the lot was held by entireties, which fact was disclosed also by the deed records in the recorder's office, and he knew also that

Mrs. Meyers had refused to sign the mortgage by reason of misrepresentations as indicated. This situation was abundantly sufficient to charge appellant with the duty of inquiry, which pursued with diligence, would have disclosed to him the real facts. *Webb v. John Hancock, etc., Ins. Co.* (1904), 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632.

The mortgage being of record, appellee Parker had constructive notice of its existence and terms.

As the deed under which Meyers and wife 13. claimed was a deed in Parker's chain of title, he had notice constructively also that the former held by entireties. *Hazlett v. Sinclair* (1881), 76 Ind. 488, 40 Am. Rep. 254; 39 Cyc 1713; 2 Pomeroy, Eq. Jurisp. (2d ed.) §626. Such notice to Parker included that Meyers alone had executed a mortgage on the lot held by entireties. The mortgage being invalid, these facts are, however, unimportant. A like result follows if the record of the mortgage be held to be constructive notice of any vendor's lien that might exist. *Martin v. Cauble, supra*, 67, 73. If the facts were sufficient constructively to place him on inquiry, such inquiry diligently prosecuted would have led to actual knowledge of the nonexistence of a lien on either theory.

In view of the situation thus presented, we hold the evidence to be sufficient to sustain the decision. The record is free from error in other respects. Judgment affirmed.

NOTE.—Reported in 112 N. E. 31. As to sufficiency of deed to create tenancy by entirety, see Ann. Cas. 1912 C 927. As to estoppel of married woman joining with husband in deed of his land to set up dower rights, see Ann. Cas. 1916 C 900.

CHICAGO AND ERIE RAILROAD COMPANY v. BIDDINGER, ADMINISTRATOR.

[No. 8,651. Filed October 26, 1915. Rehearing denied February 4, 1916. Transfer denied March 31, 1916.]

1. **PLEADING.—Complaint.—Initial Attack on Appeal.**—The sufficiency of a complaint for want of facts can not be assailed for the first time on appeal. p. 424.
2. **DEATH.—Wrongful Death.—Action by Administrator.**—An administrator's action for the wrongful death of his decedent is wholly dependent upon the statute, and in the absence of a survivor who has sustained a pecuniary loss by the death of the decedent there is no right of action. p. 425.
3. **HUSBAND AND WIFE.—Wrongful Death of Wife.—Action for Benefit of Husband.—Statutes.**—Section 285 Burns 1914, Acts 1899 p. 405, authorizing actions for wrongful death to be maintained by the personal representative of the decedent recognizes two classes to whom the damages shall inure, the one consisting of the widow, or widower, as the case may be, and children, if any, and the other consisting of the next of kin, so that an action for the benefit of a husband may be maintained thereunder for the death of the wife, although she left neither children nor next of kin surviving. p. 425.
4. **DEATH.—Wrongful Death.—Action by Administrator.—Pecuniary Interest of Persons for Whom Action is Maintained.—Complaint.**—In an administrator's action for the wrongful death of his decedent, the allegation that there are persons to whom, under the statute, the damages will inure, renders the complaint sufficient in that respect without the allegation that the persons for whose benefit the action is brought have a pecuniary interest in the life of the decedent. p. 426.
5. **RAILROADS.—Crossing Accidents.—Complaint.—Sufficiency.**—A complaint to recover for the wrongful death of one who was hit by a train at a crossing, alleging that decedent and her husband were traveling in a buggy toward the railroad to pass over the crossing, that the husband was driving, "and while he was so driving and as plaintiff's intestate approached and entered near to said railroad crossing they proceeded carefully and exercised all due care and caution to see or hear any train or engine or locomotive that might be approaching said crossing", was sufficient as against the theory that the statutory duty to sound the whistle and ring the bell applies only as to travelers on public highways actually crossing, or who had crossed, or who were about to cross. p. 427.
6. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Husband and Wife.**—In an administrator's action for the wrong-

ful death of a married woman, who, while riding with her husband, was struck by defendant's train at a highway crossing, it was not necessary for plaintiff to allege or prove that the occupants of the buggy were free from contributory negligence, and even though it may have appeared from the complaint that decedent's husband who was driving, was guilty of negligence, such negligence could not be imputed to decedent. p. 428.

7. PLEADING.—*Demurrer to Complaint.*—*Facts Admitted.*—Facts well pleaded in a complaint are to be taken as admitted as against a demurrer. p. 430.
8. NEGLIGENCE.—*Complaint.*—*Contributory Negligence.*—*Question for Jury.*—Where the facts alleged in the complaint are of such nature and character as to be reasonably subject to more than one inference as to whether the injured party was guilty of contributory negligence, the question is for the jury. p. 430.
9. RAILROADS.—*Crossing Accidents.*—*Verdict.*—*Answers to Interrogatories.*—Where the general verdict amounted to a finding that defendant railroad company had violated the statute with respect to the sounding of the whistle and ringing of the bell on the approach of its train to the crossing, as well as an ordinance regulating the speed of trains, and that decedent was not guilty of negligence materially contributing to her death, answers by the jury to interrogatories from which it appeared that the train was running at forty miles per hour, that decedent was well acquainted with the crossing, that the view of the crossing was obstructed at certain distances, etc., were not in irreconcilable conflict with the general verdict. p. 431.
10. APPEAL.—*Review.*—*Harmless Error.*—*Instructions.*—While the practice of reading the complaint to the jury instead of stating the issues and theory of the complaint is subject to criticism, such action does not constitute reversible error, and especially where it appears that the court in another instruction told the jury that the complaint is not evidence and that the jury should not be influenced in any manner by the statements therein contained. p. 432.
11. HUSBAND AND WIFE.—*Wrongful Death of Wife.*—*Damages.*—*Instructions.*—In an administrator's action for the wrongful death of his decedent, brought for the benefit of decedent's surviving husband, instructions stating that the damages, if any, suffered by the husband were pecuniary, and that the jury might take into consideration the expectancy of life of decedent, her habits of industry, thrift and economy, the nature and extent of services rendered for her husband, that the amount of her personal expenses should be deducted therefrom, and that no damages should be assessed for pain and suffering of decedent, nor for the wounded feelings of the husband, correctly stated the law so far as they went, and were unobjectionable in the absence of any request for instructions embodying features alleged to have been omitted. p. 433.

12. **NEGLIGENCE.—Contributory Negligence.**—It is not every act of negligence on the part of an injured person that will defeat recovery, but such only as materially contributes to the injury. p. 433.
13. **RAILROADS.—Crossing Accidents.—Failure to Signal Approach to Crossing.—Negligence.—Instructions.**—An instruction that the failure of defendant railroad company to comply with the statute in reference to sounding the whistle and ringing the bell on approaching a highway crossing would amount to negligence, was not erroneous. p. 434.
14. **RAILROADS.—Crossing Accidents.—Violation of City Ordinance.—Negligence.—Instructions.—Review.**—While it is generally the duty of the court to say as a matter of law that a city ordinance is or is not in force, an instruction that if the jury found that there was an ordinance in force which limited the speed of trains, the violation thereof would be negligence, was not ground for reversal in view of interrogatories and instructions submitted by appellant from which it appeared that the error was invited. p. 434.
15. **HUSBAND AND WIFE.—Wrongful Death of Wife.—Action.—Right of Recovery.—Instructions.**—In an administrator's action for the death of his decedent, brought for the benefit of decedent's surviving husband, the defendant was not entitled to a peremptory instruction in its favor on the theory that while the complaint alleged that the husband was the sole heir of his deceased wife, the evidence showed that she left a father and mother who were heirs at law to one-fourth of the estate over \$1,000, since the husband belonged to the first class of persons who under the statute would be entitled to damages, and where there are persons of this class the damages are awarded to them to the exclusion of the other class. p. 435.
16. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Evidence.—Review.**—The objection that decedent and her husband had encased themselves in a top buggy with the top up and side curtains on, so that it was impossible for them to see, except directly in front of them, and then proceeded to drive toward a dangerous crossing without stopping, and only looked at a point about one hundred feet south of the crossing, etc., was not available in view of evidence and answers by the jury to interrogatories showing that decedent and her husband looked and listened as they approached the crossing from a point where they had a view of the track for about three hundred feet, and that if defendant company had obeyed the statutory provisions as to signals and the provisions of an ordinance regulating the speed of trains, decedent and her husband would have had time to have crossed the track in safety after having looked and listened. p. 436.
17. **APPEAL.—Review.—Refusal of Instructions.**—There was no error in the refusal of instructions requested, but not applicable to the case, as well as of one fully covered by instructions given. p. 438.

Chicago, etc., R. Co. v. Biddinger—61 Ind. App. 419.

18. *APPEAL.—Review.—Admission of Evidence.*—In an administrator's action for the wrongful death of his decedent, brought for the benefit of decedent's surviving husband, the admission of testimony by the husband as to the extent of his property, though improper, was not ground for review in the absence of any specific objection directing the attention of the trial court to the infirmity in such testimony. p. 439.
19. *DEATH.—Excessive Damages.—Review.*—Where decedent was twenty-three years of age, of good health, a bright, active woman, of kindly temperament, economical and industrious in her habits, familiar with and able to perform the duties that fell to her lot as a farmer's wife, a verdict for \$3,000 in an administrator's action for the benefit of her husband was not excessive. p. 439.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action by Err Biddinger, administrator of the estate of Minnie M. Biddinger, deceased, against the Chicago and Erie Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. O. Johnson, *Bull & Johnson* and *Harley A. Logan*, for appellant.

Arthur Metzler, for appellee.

MORAN, J.—On April 1, 1911, while Err Biddinger, accompanied by his wife, Minnie Biddinger, was attempting to cross appellant's railroad upon the principal street of the city of Rochester, Indiana, the conveyance in which they were riding was struck by appellant's west bound passenger train and the occupants of the conveyance were violently thrown therefrom and Minnie Biddinger was severely injured, from the effects of which she died the following day. Appellee, as administrator of her estate, brought an action against appellant alleging that her death was caused by the negligence of appellant. A trial by a jury resulted in a verdict in favor of appellee in the sum of \$3,000. From a judgment on the verdict, appellant has

appealed and seeks a reversal on the grounds: (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) error in overruling a demurrer to each paragraph of complaint; (3) error of the court in overruling appellant's motion for judgment on answers to interrogatories; (4) error in overruling appellant's motion for a new trial; (5) error in overruling appellant's motion in arrest of judgment; and (6) error in overruling motion to modify judgment.

The complaint is in two paragraphs, and the material allegations that are common to both paragraphs are, that on April 1, 1911, appellant was a corporation, organized under the laws of the State of Indiana, and that its line of railroad passed through the city of Rochester, Indiana, in an easterly and westerly direction, crossing the main street of the city at right angles; on the west side of the street south of the crossing were located a large number of frame buildings, and on the east side and south of the crossing were located a number of dwellings, piles of tile, forest trees, an elevator and freight cars, which obstructed the view to the railroad east of the crossing and the approach of trains from that direction. As Err Biddinger and his wife drew near the crossing, they exercised due care and caution to hear the approach of trains; that appellant carelessly and negligently ran its train of cars to the west at a speed of forty miles per hour, and against the conveyance in which Err Biddinger and his wife were riding, and that his wife by reason thereof was violently thrown from the conveyance and greatly injured, so that she died on the following day; the operators of appellant's train failed to sound the whistle or ring the bell attached to the locomotive until within about 150 feet of the crossing, not leaving

sufficient time for the decedent and her husband to escape; if the whistle had been sounded at a point not less than 80 rods nor more than 100 rods from the crossing, and if the bell had been rung not less than 80 rods nor more than 100 rods from the crossing, and continuously until the train of cars had passed the crossing, the accident could have been avoided. It is alleged that the husband of the decedent is the sole heir and next of kin and entitled to any damage that may accrue by reason of the death of his wife. The second paragraph, in addition to the above facts, alleges the violation of an ordinance of the city of Rochester, which limits the speed of locomotives and trains to twenty-five miles per hour, and, at the time of the accident, the locomotive that came in contact with the conveyance in which the decedent and her husband were riding, was propelled at a high and dangerous rate of speed of forty miles per hour. Damages were demanded in the sum of \$10,000.

The first assignment of error presents no question for review. The sufficiency of the complaint for want of facts can not be assailed

1. for the first time in the appellate tribunal, since the passage of the act of March 4, 1911. Acts 1911 p. 415, §344, 348 Burns 1914. *Robinson v. State* (1912), 177 Ind. 263, 97 N. E. 929; *Stiles v. Hasler* (1913), 56 Ind. App. 88, 104 N. E. 878. Appellant urges that the demurrer should have been sustained to each paragraph of the complaint for the reason, that before there can be a recovery under the statute for the death of one caused by the wrongful act of another, the complaint must disclose that some one of the class of persons for whom the action can be maintained under the statute, was dependent, in some way, for support upon the decedent; and that the allegation that

the husband is the sole heir and entitled to any damages that might inure by reason of the wrongful death of the decedent does not bring the complaint within the purview of the statute, authorizing the administrator to maintain an action under §285 Burns 1914, Acts 1899 p. 405. The right of action, if it exists, is wholly dependent upon

2. the statute, being unknown to the common law. And unless there is a survivor, who has sustained a pecuniary loss by the death of Minnie Biddinger, there is no right of action. *Louisville, etc., R. Co. v. Goodykoontz* (1889), 119 Ind. 111, 21 N. E. 472, 12 Am. St. 371; *Pittsburgh, etc., R. Co. v. Reed* (1909), 44 Ind. App. 635, 88 N. E. 1080; *Duzan v. Myers* (1903), 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. 341; *Wabash R. Co. v. Cregan* (1899), 23 Ind. App. 1, 54 N. E. 767. The act of 1881 (Acts 1881 [s. s.] p. 240, §284 R. S. 1881, §285 Burns 1894), which remained the law until amended in 1899 (Acts 1899 p.

3. 405, *supra*), provided, among other things, that when the death of one is caused by the wrongful act of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained the action, had he lived, against the latter for an injury for the same act or omission. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the decedent. The supreme court of the state of Kansas, in construing a statute embodying language identical with the above, held that the husband was entitled to recover for the wrongful death of his wife (*Atchison, etc., R. Co. v. Townsend* (1905), 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191), on the theory that he came within the pro-

visions of the statute providing that the next of kin was entitled to recover. This construction was placed upon the statute by reason of the provisions therein that the amount recovered should be distributed in the same manner as personal property of the decedent. While it is well to keep before us the light furnished in this behalf, yet the conclusion we have reached as to the sufficiency of the complaint, as against the objections urged in this particular need not be based upon that part of the statute that gives the husband, as next of kin, the right to recover according to the construction placed thereon by the supreme court of the state of Kansas, for by the amendatory act of 1899, *supra*, which was in force at the time this action was instituted, and is still the law, the word, "widower" was added to the clause, so it reads, "The damages * * * must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin," etc. By the statute two classes of persons are recognized as beneficiaries. The first class is made up of the widow or widower, as the case may be, and the children, if there be any such persons surviving. The second class consists of the next of kin to the decedent. *Pittsburgh, etc., R. Co. v. Reed, supra*.

It is admitted by appellant that when the action is brought by the administrator for the widow or children, or for both, that the general allegation that the decedent left a widow or children, as the case may be, who will sustain damages by reason of his death, that the complaint is sufficient in this respect; but this, it is urged, is by reason of the fact that the husband is under legal obligations to support his wife and children, which obligation does not apply to the wife. It has been

held that the law will imply that the widow and minor children of a decedent have sustained a loss by reason of his death. *Korrady v. Lake Shore, etc., R. Co.* (1892), 131 Ind. 261, 29 N. E. 1069; *Pittsburgh, etc., R. Co. v. Reed, supra.* "The children of a decedent are the next of kin, but they are put in the class with the widow or widower, as the case may be, by the statute, but the phrase 'next of kin', as used in the statute, relates to other than the decedent's children." *Pittsburgh, etc., R. Co. v. Reed, supra.* It was said in *Pennsylvania Co. v. Coyer* (1904), 163 Ind. 631, 72 N. E. 875, "It has never been held in this State that the complaint must show the fact that the widow, widower, children, or next of kin of the deceased had a pecuniary interest in his life, or the nature or extent of that interest." The complaint under consideration is sufficient against the objections urged in this respect, as it is only necessary to allege that there are such persons to whom, under the statute, the damages recovered may inure. *Salem Bedford Stone Co. v. Hobbs* (1894), 11 Ind. App. 27, 38 N. E. 538; *Commercial Club, etc. v. Hilliker* (1898), 20 Ind. App. 239, 50 N. E. 578.

It is further insisted that the complaint does not show a liability because the statutory duty imposed by law on railroad companies to sound

5. the whistle and ring the bell applies only as to travelers on public highways actually crossing, or who had crossed, or who were about to cross (*New York, etc., R. Co. v. Martin* [1905], 35 Ind. App. 669, 72 N. E. 654), and that the allegations of the complaint do not bring it within the statute. The complaint alleges, "That on said first day of April, 1911, plaintiff's intestate and said Err Biddinger, her husband, were driving north on said Michigan road or main street with a horse

hitched to a buggy, in which they were seated and riding to pass over said crossing, said Err Biddinger driving said horse, and while he was so driving and as plaintiff's intestate approached and entered near to said railroad crossing they proceeded carefully and exercised all due care and caution to see or hear any train or engine or locomotive that might be approaching said crossing." The allegations of the complaint answer appellant's argument in this respect.

It is further insisted that the complaint is bad because it discloses that the decedent and her husband were guilty of contributory negli-

6. gence. The burden of appellant's argument is that the complaint discloses that the crossing was a dangerous one for the reason that the view to the railroad east of the street was obstructed, and that, while the complaint shows that the occupants of the buggy proceeded carefully, as they approached the crossing, they did not stop; that they should have exercised a higher degree of care and vigilance for their safety than they did. In considering appellant's contention, it is well to keep in mind that contributory negligence is a matter of defence and that it was not necessary for appellee to allege or prove that the occupants of the buggy were free from contributory negligence. §362 Burns 1914, Acts 1899 p. 58; *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005. It will be noticed that the husband of the decedent was driving the horse at and before the time the accident occurred. The legal relation that an occupant in a conveyance bears to the driver when an injury results by the conduct of another to the passenger or guest in the conveyance has received much attention by the courts and text-book writers. The English case of

Thorogood v. Bryan (1849), 8 C. B. 115, decided in 1849, seems to be the origin of the doctrine that the negligence of the driver should be imputed to the passenger. The doctrine announced in that decision was criticized as being unsound and not followed by Justice Fields in speaking for the court in the case of *Little v. Hackett* (1886), 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, and was finally overruled by the House of Lords in 1888 in the case of *Bernina* (1888), 13 App. Cas. (L. R.) 1. See, also, *Duwall v. Atlantic Coast Line R. Co.* (1904), 134 N. C. 331, 46 S. E. 750, 101 Am. St. 830, 65 L. R. A. 722; *Dean v. Pennsylvania R. Co.* (1889), 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. 733, 6 L. R. A. 143; *Union Pac. R. Co. v. Lapsley* (1892), 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800. In the case of *Duwall v. Atlantic Coast Line R. Co.*, *supra*, the negligence of the father, who was driving a horse, was not imputed to his daughter, who was seated in the conveyance with him at the time of the accident. And in the case of *Union Pac. R. Co. v. Lapsley*, *supra*, Sanborn, J., held that the negligence of the brother, who was driving, could not be imputed to his sister. While the courts are not entirely in accord as to the doctrine of imputed negligence, the weight of authority is that the occupant of the conveyance or traveler, who does not act in privity with the driver can not be charged with his negligence. "It is only where the driver is negligent, and is subject to the control of the passenger, that the negligence of the former will be attributed to the latter." *Board, etc. v. Mutchler* (1894), 137 Ind. 140, 36 N. E. 534. See, also, *Hoag v. New York, etc., R. Co.* (1888), 111 N. Y. 199, 18 N. E. 648; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Chicago, etc., R. Co. v. Spilker* (1893), 134 Ind.

380, 33 N. E. 280, 34 N. E. 218; *City of Vincennes v. Thuis* (1902), 28 Ind. App. 523, 63 N. E. 315.

It was said in *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261, 38 N. E. 476, "the jury were informed that if the intestate was, at the time of the accident, riding in a conveyance driven and controlled by her husband, and if she was killed by the negligence of the appellant, being herself free from fault, her husband's negligence, if he were guilty of any, could not be imputed to her. This, however, is the law."

The marriage relation alone did not, in this case, have the effect of making her responsible for the negligence of her husband providing her husband was guilty of negligence, which we need not decide. Of course, it must not be understood that she was relieved from the duty of exercising ordinary care for her own safety under the circumstances. *Dean v. Pennsylvania R. Co., supra*; *New York, etc., R. Co. v. Robbins* (1906), 38 Ind. App. 172, 76 N. E. 804; *Aurelius v. Lake Erie, etc., R. Co.* (1898), 19

Ind. App. 584, 49 N. E. 857; *Lake Shore,*

7. *etc., R. Co. v. Boyts* (1897), 16 Ind. App.

640, 45 N. E. 812. All the facts well pleaded,

relating to the conduct of the husband and the decedent as they approached the crossing at the time of the accident must be taken as admitted as against the demurrer. The facts set up in the

complaint are of such a nature and character

8. as to be reasonably subject to more than one inference or conclusion as to whether appellant's decedent exercised due care or was guilty of contributory negligence, hence the ultimate fact as to whether she did exercise due care or was guilty of contributory negligence was properly left to the jury as a question of fact, and not determined as a matter of law by the court. *Greena-*

Chicago, etc., R. Co. v. Biddinger—61 Ind. App. 419.

waldt v. Lake Shore, etc., R. Co. (1905), 165 Ind. 219, 74 N. E. 1081; *Indiana Union Traction Co. v. Love, supra.*

The answers to the interrogatories disclose that the locomotive that caused the death of appellee's intestate, was run at the time at a speed of

9. forty miles per hour; the decedent was well acquainted with the crossing; for a considerable distance south of the crossing and on the east side of the street, a view to the railroad was obstructed by an elevator; thirty-one and a half feet south of the crossing, the decedent could have seen the approach of the train for three hundred feet, if no cars were standing on the sidetrack; on the evening of the accident, a freight car occupied the siding; a view of fifty feet could be had to the east after the occupants of the conveyance reached a point within thirteen and a half feet from the south rail of the crossing; south of the elevator for a space of fifteen feet a view to the east for a distance of 500 feet could be had, and the decedent and her husband looked to the east at this point and did not see the train approaching; the horse drawing the conveyance was not stopped within two city blocks of the crossing; at the point where the decedent and her husband looked to the east, they could have seen the train, had it been approaching at the time; an ordinance was in force in the city of Rochester at the time regulating the speed of trains within the corporate limits of the city.

The general verdict, finding as it does that all the material allegations of the complaint have been established, which includes the violation of the statute as to the sounding of the whistle and the ringing of the bell, as well as the violation of an ordinance regulating the rate of speed of trains passing through the corporate limits of the city, is

not brought in conflict with the answers to interrogatories, for there is no material fact established by the answers inconsistent with appellee's right to recover. The general verdict likewise finds that the decedent was not guilty of negligence that materially contributed to her death. Before the answers to interrogatories could overthrow the general verdict, there would have to be such a conflict between the same that they could not be reconciled, which does not exist.

Appellant assigns numerous reasons why a new trial should have been granted. The court's attention is directed, first, to the error relied upon

10. in the giving by the trial court of instructions Nos. 1, 3 and 4 of its own motion, and Nos. 7, 8, 17 and 18 at the request of appellee, and in refusing instructions Nos. 1, 8, 9 and 17 as requested by appellant. Instruction No. 1, as given by the court of its own motion, consisted of the reading of the first paragraph of complaint, and stating the additional averments of the second paragraph not included in the first paragraph. It is contended that there are many unnecessary averments in the first paragraph, as read to the jury, which were not proper in the pleading and upon which no evidence was offered, and which were inflammatory in their nature, intended to prejudice the jury, and thereby enhance the amount of the verdict. The practice of reading the complaint to the jury by the court, instead of stating the issues and the theory of the complaint, or each paragraph as the case might be, is a practice, no doubt, subject to criticism, but is not reversible error. *Angola R., etc., Co. v. Butz* (1913), 52 Ind. App. 420, 98 N. E. 818; *Blair-Baker Horse Co. v. First Nat. Bank* (1905), 164 Ind. 77, 72 N. E. 1027. And further we are led to believe that no

harm resulted to appellant as the court gave to the jury instruction No. 14, as tendered by appellant, by which the jury was told that the complaint was not evidence in the cause and that the jury should not be influenced in any manner by any of the statements therein contained.

Instructions Nos. 3 and 4 given by the court of its own motion to the jury and No. 18 given at the request of appellee, went to the measure of damages. Considering the same as one

11. charge, the jury was informed that, if any damage was suffered by the husband, it was pecuniary, and in this connection, the jury might take into consideration, the expectancy of life of the decedent, her habits of industry, thrift and economy, the nature and extent of the services rendered for her husband, that the amount of her personal expenses should be deducted therefrom, that no damages should be assessed for pain and suffering of the decedent, nor for the wounded feelings of the husband. The field covered by these instructions upon the measure of damages is practically the same as an instruction which was approved by this court in the case of *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822. The instructions on the measure of damages correctly stated the law so far as the law was attempted to be covered thereby, and as appellant did not tender an instruction including the statement, which it says should have been embodied, it can not now be heard to complain. *Cleveland, etc., R. Co. v. Clark, supra*. Instruction No. 7 tendered by the appellee and given by the court, informed the jury that it was not every

act of negligence on the part of the person
12. injured that would defeat a recovery, that the negligence must materially contribute

to the accident in order to defeat a recovery. And then the jury was further informed by this instruction and by instruction No. 8, given at the request of appellee, that the failure to comply with the statute in reference to sounding the whistle and ringing the bell on approaching a highway crossing would amount to negligence. No error was committed by the trial court in the giving of either of these instructions. *Nave v. Flack* (1883), 90 Ind. 205, 46 Am. Rep. 205; *Mat-chett v. Cincinnati, etc., R. Co.* (1892), 132 Ind. 334, 31 N. E. 792; *Pittsburgh, etc., R. Co. v. Light-heiser* (1904), 163 Ind. 247, 71 N. E. 218, 680; *Baltimore, etc., R. Co. v. Conoyer* (1898), 149 Ind. 524, 48 N. E. 352, 49 N. E. 452. Instruction No. 17, given by the court at the request of appellee,

among other things states that, if the jury
14. found that there was an ordinance in force in the city of Rochester, Indiana, which limited the speed of steam cars to twenty-five miles per hour, to exceed this limit would be negligence. Ordinarily it is the duty of the court to say as a matter of law as to whether an ordinance is or is not in force, and not leave it to the jury as a question of fact. *Plummer v. Indianapolis Union R. Co.* (1914), 56 Ind. App. 615, 104 N. E. 601. The record discloses that appellant tendered to the court interrogatories Nos. 1 to 30, inclusive, and asked the court to submit the same to the jury to be answered, which the court did. Interrogatory No. 30 and the answer thereto are as follows: "Was ordinance No. 11 in force in the city of Rochester, Indiana, on April 1, 1911? Yes." And further appellant tendered to the court instruction No. 19, which it requested the court to give to the jury, and which contained the following: "Unless you find from the evidence

that ordinance No. 11 in the city of Rochester was placed upon its passage after each its first and second reading by the city council; and unless you find further that said city council voted upon the passage of said ordinance," etc. With this state of the record, the error was invited, and appellant is not now in position to raise objections to instruction No. 17. Elliott, App. Proc. §627.

By appellant's instruction No. 1, the court was asked to direct the verdict of the jury in its favor.

In the main, the same questions presented 15. by the error predicated on the request to give this instruction, are presented by the causes for a new trial, that the verdict of the jury is contrary to law and not supported by the evidence, and as a matter of convenience will be considered together. It is contended that the allegations of the complaint were disproved for the reason that, while the complaint alleges that the husband was the sole heir of the deceased wife, the evidence discloses that she left a father and mother, who were heirs-at-law to one-fourth of the estate over \$1,000, and that there can be but one recovery for all the beneficiaries. §3027 Burns 1914, §2489 R. S. 1881. In passing on the sufficiency of the complaint to withstand the demurrer, we held that the statute placed the widower in the first class of persons, for whom an action could be brought for the death of another, and it has been held: "If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their benefit, if there were persons of the first class entitled." *Dillier v. Cleveland, etc., R. Co.* (1904),

34 Ind. App. 52, 72 N. E. 271. See, also, *Leyhan v. Leyhan* (1911), 47 Ind. App. 280, 94 N. E. 337.

It is next urged that the decedent and her husband encased themselves in a top buggy with the top up and side curtains on, so that it

16. was impossible for them to see, except directly in front of them, and then proceeded to drive towards a dangerous crossing without stopping and only looked and listened at a point something like a hundred feet south of the crossing; that both the decedent and her husband had full knowledge of the obstruction which prevented a view of an approaching train from the east. There is evidence that the decedent and her husband started for their home from the city of Rochester about a quarter after five on the evening of the accident; the horse drawing the buggy in which they were riding was gentle, and was brought to a walk four or five rods south of the crossing and continued this gait to the place of the accident; there was a space of about fifteen feet just south of the elevator where a view of the tracks of the railroad could be had for some 300 feet; at this point the decedent and her husband looked to the east but saw no train approaching; before reaching the sidetrack, the decedent and her husband leaned forward in the buggy and looked to the east and west for the approach of trains; the alarm bell began to ring after they had reached the sidetrack; at this point the whistle was sounded for the first time; the horse became frightened and ran to the west, and as the driver was endeavoring to control the horse and avert the danger, the buggy was struck by the locomotive, and Mrs. Biddinger was hurled from the rig and her body was found some sixty feet west of the crossing badly bruised and mangled from the effects of

which she died at 1:50 the next morning; the whistle was not sounded from within a half mile of the crossing until the locomotive was within 150 feet thereof, nor was the bell ringing when the train reached the crossing; the train was being run at from 40 to 60 miles per hour; the road ran about due east and west and for some distance south of the crossing where the accident occurred, the view to the approach of trains to the east was obstructed by an elevator standing back from the street about twenty-five feet. On the evening of the accident, a freight car was standing on the sidetrack along the north side of the elevator, the west end of the car being on a line with the west end of the elevator.

Appellant's learned counsel urge with much earnestness that the facts bring the case at bar within the rule of law announced in the case of *Cleveland, etc., R. Co. v. Pace* (1913), 179 Ind. 415, 101 N. E. 479. In that case the buggy in which Pace was riding, in addition to having side curtains, had a storm front, and except an isinglass window twelve by eighteen inches in the storm front, Pace's vision was obstructed on all sides; on account of his being inclosed his hearing was greatly impaired, so much so that persons, who attempted to warn him of his danger were unable to attract his attention, and further in the Pace case, the engine whistle, sharply sounded, was heard 300 feet from where the collision took place; the answers to interrogatories disclosed that there was no evidence as to whether Pace looked and listened for the approach of trains. Not so in the case at bar; here the evidence and answers to the interrogatories disclose that the decedent and her husband looked and listened as they proceeded towards the crossing, and at such a place as they had a view of the track for something like 300 feet. It is

true that while the gait of the horse drawing the buggy in which the decedent and her husband were riding was reduced to a walk, the driver did not stop the conveyance. No doubt a condition might arise when the failure of a traveler to stop on approaching a railroad crossing would be such an act of negligence that the court might say as a matter of law that the party failing to do so would be guilty of negligence. The facts do not bring the case at bar within this rule. There is evidence that appellant failed to observe the statutory signals by sounding the whistle and ringing the bell, and also in exceeding the speed limit fixed by the ordinance. Had appellant been obeying the statute and ordinance, as the decedent had a right to believe it would, the absence of the train at the point where she looked would have given herself and husband time to have crossed the track in safety, but at the rate the evidence discloses the train was traveling, the precaution taken was of no avail. Under the evidence and surrounding circumstances, the trial court was clearly right in refusing to give to the jury instruction No. 1, as tendered by appellant, and in submitting the ultimate fact to the jury as to whether the decedent used that degree of care commensurate with the magnitude of the danger encountered. *Cleveland, etc., R. Co. v. Starks* (1915), 58 Ind. App. 341, 106 N. E. 646. Instructions Nos. 8 and 17, as requested by appellant, were not applicable to the theory upon which the cause was tried,

17. and the branch of the case sought to be covered by appellant's instruction No. 9, was fully covered by other instructions given, so no error was committed in refusing the instructions tendered by appellant.

It is claimed that the court erred in admitting in

evidence the speed ordinance of the city of Rochester, on the ground that the record failed to show that it had been voted on by the city council and that it was signed by the presiding officer of the council, as provided by §8683 *et seq.* Burns 1914, Acts 1905 p. 219, §81. We have carefully examined the record as to the various steps disclosed thereby as to the passage of the ordinance, and we are convinced that appellant's position is not well taken.

Over the objection of appellant, the husband of decedent was permitted to testify as to the extent of property he owned. This testimony

18. should have been excluded. *Alberti v. New York, etc., R. Co.* (1889), 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765. The objection, however, made to this testimony was that it was not material and not tending to prove or disprove anything. The trial court's attention should have been directed to the infirmity of this class of testimony by a more specific objection, in order to present the same for review in this court. *Stringer v. Frost* (1889), 116 Ind. 477, 19 N. E. 331, 9 Am. St. 875, 2 L. R. A. 614; *Ohio, etc., R. Co. v. Walker* (1888), 113 Ind. 196, 15 N. E. 234, 3 Am. St. 638; *Malott v. Central Trust Co.* (1907), 168 Ind. 428, 79 N. E. 369, 11 Ann. Cas. 879.

It is urged that the damages assessed by the jury were excessive. The decedent was twenty-three years of age, of good health, a bright,

19. active woman, of kindly temperament, economical and industrious in her habits, familiar with and able to perform the duties that fell to her lot as a farmer's wife. In the light of the evidence a verdict for \$3,000 was not excessive. *State v. Miller* (1910), 180 Fed. 796.

A number of other questions are presented by

the record, all of which we have carefully considered and find no error prejudicial therein to appellant. Judgment affirmed.

NOTE.—Reported in 109 N. E. 953. As to whether damages for personal injuries resulting in death were excessive or inadequate see L. R. A. 1916 C 820. As to personal contributory negligence of person riding in vehicle driven or controlled by another at railroad crossing, see L. R. A. 1915 E 225. As to duty of railroad employees on approaching crossing as affected by traveler's view of track, see 22 L. R. A. (N. S.) 232. Generally on the question of measure of damages for death of husband or wife, see 17 L. R. A. 71. As to contributory negligence of one spouse as bar to recovery for injuries to other, see Ann. Cas. 1912 A 647. As to measure of damages recoverable by husband for death of wife by wrongful act, see Ann. Cas. 1915 A 700. As to what is excessive verdict in action for death by wrongful act, see 18 Ann. Cas. 1209, Ann. Cas. 1915 C 449. As to the law governing the distribution of damages recovered for death by wrongful act, see Ann. Cas. 1913 D 282.

THE BRIGHT NATIONAL BANK OF FLORA, INDIANA
v. HARTMAN ET AL.

[No. 8,753. Filed October 14, 1915. Rehearing denied February 2, 1916. Transfer denied March 31, 1916.]

1. APPEAL.—*Record.—Transcript.—Identity of Pleadings.*—On appeal from the judgment of a circuit court to which the cause had been taken on a change of venue, where the transcript did not show by any caption, statement or certificate of the clerk of the court from which the venue was taken that the original pleadings and papers on file in that court were transferred to the court to which the venue was taken, but it did appear from what purported to be the certificate of such clerk that a "full, true and complete copy of all the order book entries showing the proceedings" was transmitted to the latter court, and that certain pleadings were transmitted, and the transcript on appeal bore the certificate of the clerk of the court from which the appeal was taken showing that it embraced a full, true and correct copy of all pleadings, papers, documents and record filed or placed on file, as requested by the *precipe*, the appellant would not be heard to say that the pleadings copied in the transcript were not the pleadings on which the case was tried, but the court could not know that such pleadings were the identical pleadings challenged by demurrer in the court from which the venue was taken, and could not pass upon assignments of error relating to their sufficiency. pp. 443, 444.

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2. **APPEAL.—*Precipe.*—*Sufficiency.***—A *precipe* calling for a transcript of all pleadings, papers, documents and records filed or placed on file in the cause, together with all and singular the papers, pleadings, documents and proceedings and order book entries made and filed in the cause in the court of another county from which the venue was changed, was sufficient. p. 443.
3. **APPEAL.—*Waiver of Error.*—*Briefs.***—Alleged error is waived by appellant's failure to present same in its brief. p. 445.
4. **APPEAL.—*Transcript.*—*Precipe.***—Where the first part of the *precipe* was general and broad enough to include all the instructions, specific directions not in conflict therewith, but which did not call for certain instructions, did not operate to exclude any of the instructions, all of which were copied in the transcript. p. 445.
5. **LICENSES.—*Rights of Unlicensed Persons.*—*Contracts.***—Where a statute forbids the carrying on of any business without first procuring a license, paying a tax, inspection, registration, complying with prescribed tests, or the like, contracts relating thereto made by persons in carrying on such business are void, though the statute contains no express provision to that effect. p. 447.
6. **LICENSES.—*Authority to Conduct Business.*—*Presumption and Burden of Proof.***—Where a statute fixes certain requirements as conditions precedent to the right to carry on a certain business, or to the performance of certain acts, and fixes a penalty for noncompliance therewith, the party who seeks to enforce a right dependent upon such law has the burden of showing compliance therewith and may not rely upon the presumption that the requirements of the law have been satisfied. p. 448.
7. **BILLS AND NOTES.—*Burden of Proof.*—*Consideration.***—Where want of consideration is pleaded by the maker of a promissory note as a defense to the suit of an indorsee of such note, the burden is on the defendant to prove such defense by a fair preponderance of the evidence bearing on that question. p. 448.
8. **BILLS AND NOTES.—*Burden of Proof.*—*Fraud or Illegality.***—Where fraud or illegality in the execution or procurement of a note is set up as a defense to the suit of an indorsee, the burden is on the plaintiff to show his protection from such defense as a good faith purchaser for value before maturity of the note. p. 448.
9. **BILLS AND NOTES.—*Indorsement.*—*Rights of Purchasers.***—Though a good faith purchaser for value before maturity of a negotiable promissory note, fair and regular on its face, payable at a bank in this State, is protected from defenses that might be available against the original payee, one dealing in commercial paper is required to use reasonable diligence and to take cognizance of any fact or circumstance that is reasonably calculated to excite the suspicion of a reasonably cautious person, and if the facts or circumstances are such as to put a reasonably cautious person on inquiry, he can not refrain from such inquiry and occupy the position of a good faith purchaser. p. 449.

10. **BILLS AND NOTES.—Action by Indorsee.—Sufficiency of Evidence.—Notice.**—Notice to an indorsee of a promissory note of facts or circumstances to put him on inquiry may be shown by a fair preponderance of the evidence bearing on such issue. p. 449.
11. **APPEAL.—Review.—Refusal of Instructions.**—Where the instructions given fully and accurately stated the law, there was no error in the refusal of requested instructions fully covered thereby or which were misstatements of the law. p. 451.
12. **APPEAL.—Review.—Evidence.—Sufficiency.**—In an indorsee's action on a promissory note, defended on the ground that plaintiff was not a good faith purchaser for value before maturity, the verdict, being supported by evidence warranting the inference of every fact essential to the defense, was conclusive. p. 451.
13. **APPEAL.—Verdict.—Conclusiveness.**—Where different inferences may be reasonably drawn from the evidence and the jury has drawn the inferences necessary to support the verdict, the judgment will not be reversed on the ground of insufficient evidence. p. 452.
14. **WITNESSES.—Competency.—Conversation with Decedent.**—In an indorsee's action on a note, purchased from the estate of the payee, who was dead, under circumstances exempting the estate from liability, the defendant was competent to testify to a conversation with decedent appertaining to the sale of merchandise for which the note was given. p. 452.

From Blackford Circuit Court; *Wm. H. Eichhorn*, Judge.

Action by The Bright National Bank of Flora, Indiana, against Joseph B. Hartman and another. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

J. Earl Fouts, Joseph G. Leffler, Walter L. Ball and Albert E. Needham, for appellant.

Meade S. Hays and Koons & Koons, for appellee.

FELT, J.—This suit was brought by appellant as assignee of a certain promissory note purchased from the administratrix of the estate of William M. Doty, deceased. The suit was commenced in the Grant Superior Court where all the issues were formed. The first five specifications of alleged error relate to rulings of the Grant Superior Court in the formation of the issues. After the issues were

formed, the case was sent to the Blackford Circuit Court on change of venue. The other assignments allege error of the Blackford Circuit Court in overruling appellant's motion to suppress the deposition of F. A. Wood and in overruling its motion for a new trial.

Appellees contend that no question relating to the proceedings in the Grant Superior Court is duly presented and support their contention by the following propositions: (1) The *precipe* is not sufficient to authorize the incorporation of such proceedings in the transcript on appeal; (2) the clerk of the Blackford Circuit Court has not duly certified the proceedings of the Grant Superior Court to this court; (3) no official seal is shown to be attached to the certificate of the clerk of the Grant Superior Court in certifying the proceedings to the Blackford Circuit Court; (4) the pleadings copied into the transcript are not duly identified as the pleadings on which the rulings of the Grant Superior Court were based.

Considering the points suggested in the reverse order, we find that the transcript filed in this court does not show by any caption, state-

1. ment or certificate of the clerk of the Grant Superior Court that the original pleadings and papers on file in that court were transmitted to the Blackford Circuit Court, but it does appear from what purports to be the certificate of the clerk of the Grant Superior Court, copied into the transcript to this court that "a full, true and complete copy of all the order book entries showing the proceedings" in the case was transmitted to the Blackford Circuit Court, though the record does not indicate that the seal of the clerk was attached thereto. Certain pleadings appear as a part of such transcript. The clerk of the Black-

ford Circuit Court certifies that the transcript from the Blackford Circuit Court "Contains full, true and correct copies of the originals of all pleadings, papers, documents and record filed or placed on file * * * in the office of the clerk of" the Blackford Circuit Court and "full, true and correct copies or the originals of all papers and entries in said cause as requested by the above and foregoing *precipe*." The *precipe* calls for "a transcript of all pleadings, papers, documents and records

2. filed or placed on file in the above entitled cause * * * and all and singular of the papers, pleadings, documents and proceedings and order book entries made and filed in said cause in the Grant Superior Court and all motions, oral or written." The *precipe* is sufficient. On change of venue from a county, the statute requires the clerk to "forthwith transmit all the papers and a transcript of all the proceedings to

1. the clerk of the court of the county to which the venue is changed." §424 Burns 1914, §413 R. S. 1881. On the record presented, this court is warranted in treating the pleadings copied into the transcript as the pleadings on which the case was tried, or in other words, appellees not having previously made any contention to the contrary, will not now be heard to say that such is not the fact. But such holding does not enable us to know to a certainty that the pleadings copied into the transcript are the identical pleadings, the sufficiency of which was questioned by demurrer in the Grant Superior Court. There is nothing in the record to enable this court to know that the pleadings, to which the demurrers were addressed, were transmitted to the clerk of the Blackford Circuit Court, or that the pleadings copied into the transcript on appeal are identi-

cal with those pleadings. *Consolidated Stone Co. v. Staggs* (1905), 164 Ind. 331, 333, 73 N. E. 695; *Chicago, etc., R. Co. v. Reyman* (1906), 166 Ind. 278, 279, 76 N. E. 970; *Evansville Furn. Co. v. Freeman* (1915), 57 Ind. App. 576, 105 N. E. 258, 107 N. E. 27; *Southern Ind. R. Co. v. Martin* (1903), 160 Ind. 280, 282, 66 N. E. 886; *Smith v. Jeffries* (1865), 25 Ind. 376, 377; *Durbin v. Northwestern Scraper Co.* (1905), 36 Ind. App. 123, 125, 73 N. E. 297; *Indianapolis, etc., Transit Co. v. Andis* (1904), 33 Ind. App. 625, 628, 72 N. E. 145; *Dedrick v. Baumgartner* (1910), 46 Ind. App. 403, 92 N. E. 663; *Peterson v. Liddington* (1915), 60 Ind. App. 41, 108 N. E. 977. For the reasons above stated, and on the authority cited, we hold that the record does not sufficiently identify the pleadings to enable this court to pass upon the questions sought to be raised by the assignments of error relating to the sufficiency of the pleadings.

The error, if any, in overruling appellant's motion to suppress the deposition of F. A. Wood is waived by failure to present the same

3. in appellant's brief. Under the assignment of error relating to the overruling of the motion for a new trial, appellant has suggested numerous errors relating to the evidence and the instructions. Appellees contend that appellant's *precipe* does not call for all the instructions;

4. that it is not general, but specifically directs the clerk as to the instructions to be included in the transcript and does not call for those tendered by appellant and given. The first part of the *precipe* is general and is broad enough to include all the instructions. The specific directions are not in conflict with the general *precipe*, and therefore do not exclude any of the instructions, all of which are copied into the transcript. *Hartlage v.*

Louisville, etc., Lighting Co. (1913), 180 Ind. 666, 667, 103 N. E. 737; *Helms v. Cook* (1915), 58 Ind. App. 259, 108 N. E. 147.

To enable us to dispose of the questions relating to the evidence and the instructions, it is necessary to state briefly the character of the issues tried. The suit was on a promissory note executed by the appellees and assigned and transferred to appellant for value before maturity. The note was payable to "The Medical Chemical Company", in which name William M. Doty conducted his business. The administratrix of the estate of said Doty, by petition to the Delaware Circuit Court showed that the decedent, in his lifetime conducted the business of manufacturing and selling certain powders or stock foods in the name of "The Medical Chemical Company" and was the sole proprietor of the business; that the note of appellees, now in suit, was given for stock food purchased in the regular course of business by appellee, Joseph B. Hartman, for resale in certain designated territory in the State of Indiana; that the note was a part of the assets of the personal estate of said decedent, but not then due. On this petition, the court made an order for the sale and transfer of the note and appellant became the purchaser.

Issues were formed by an answer to the complaint in five paragraphs, the first of which was a general denial. The second paragraph proceeds on the theory that the business of the decedent, to whom the note was given, was subject to regulation by the pure food and drug laws of the State of Indiana; that the stock food for which the note was given was manufactured at South Omaha, Nebraska, and was subject to the Act of Congress approved June 30, 1906, prohibiting the manufacture or transportation of adulterated or misbranded or

deleterious foods and drugs; that neither of said laws were complied with by the decedent and the business was conducted in violation thereof; that appellant was not an innocent purchaser. The third paragraph of answer is on the theory that the stock food was worthless and there was no consideration for the note and that appellant was not an innocent purchaser. The fourth paragraph was substantially the same as the third. The fifth paragraph goes into detail to show that the powder or stock food sold appellee, Joseph Hartman, on contract, and for which the note in suit was given, had no value; that the contract of sale was procured by fraudulent representations of the vendor as to the nature and value of the stock food and drugs sold and as to the vendor's right to manufacture and sell the same; that the business was carried on in violation of the laws of Indiana (Acts 1907 p. 153, §§7638-7648 Burns 1914, Acts 1907 p. 354, §§7939-7949 Burns 1914), and of the pure food laws of the United States; that the note in suit was executed without any consideration therefor; that appellant had notice of the nature and character of the transaction and business aforesaid before the note in suit was purchased.

The first paragraph of reply is a general denial. The paragraphs of special reply allege in substance that appellant was a good-faith, innocent purchaser, for value before maturity, in the usual course of business, of the note in suit, which is a negotiable instrument payable at Marion National Bank, Marion, Indiana. It is the law in Indiana that where a statute forbids the carrying

5. on of any business without first procuring a license, paying a tax, inspection, registration, complying with prescribed tests, or the like,

contracts relating thereto made by persons in carrying on such business are void, though the statute contains no express provision to that effect. *Beecher v. Peru Trust Co.* (1912), 49 Ind. App. 184, 187, 97 N. E. 23, and cases cited. Where a statute fixes certain requirements as conditions pre-

6. cedent to the right to carry on a certain business, or to the performance of certain acts, and affixes a penalty for noncompliance therewith, the party who seeks to enforce a right dependent upon such law has the burden of showing compliance therewith and may not rely upon the presumption that the requirements of the law have been satisfied. *Beecher v. Peru Trust Co.*, *supra*, 188, and cases cited.

Where want of consideration is pleaded by the maker of a promissory note as a defense to the suit of an indorsee of such note, the burden is on the defendant to prove such defense by a

7. fair preponderance of the evidence bearing on that question. *Hill v. Ward* (1910), 45 Ind. App. 458, 460, 91 N. E. 38. Where fraud or illegality in the execution or procurement

8. of a note is set up as a defense to the suit of an indorsee, the burden is on the plaintiff to show his protection from such defense as a good-faith purchaser for value before maturity of the note. *First Nat. Bank v. Rupert* (1912), 178 Ind. 669, 671, 100 N. E. 5; *Shirk v. Neible* (1901), 156 Ind. 66, 72, 59 N. E. 281, 83 Am. St. 150; *Ray v. Baker* (1905), 165 Ind. 74, 90, 74 N. E. 619; *First Nat. Bank v. Ruhl* (1890), 122 Ind. 279, 23 N. E. 766; *Pope v. Branch County Sav. Bank* (1899), 23 Ind. App. 210, 213, 54 N. E. 835; *Giberson v. Jolley* (1889), 120 Ind. 301, 303, 22 N. E. 306. While good-faith purchasers for

value before maturity of negotiable promissory notes, fair and regular on their face, payable at a bank in this State, are protected from defenses that might be available against the original payee, nevertheless, persons dealing in commercial paper are required to use reasonable diligence and to take cognizance of any fact or circumstance that is reasonably calculated to excite the suspicion of a reasonably cautious person. Where the facts or circumstances are such as would put a reasonably cautious person on inquiry as to defenses to a suit on the note, a purchaser thereof will be charged with such notice and knowledge as he might obtain by reasonable diligence. Under such conditions, he may not arbitrarily refrain from making inquiry or reasonable investigation to ascertain whether there is a defense to the note and if under such circumstances he does refrain from so doing he can not occupy the position of a good-faith purchaser for value before maturity. *State Bank, etc. v. Lawrence* (1912), 177 Ind. 515, 519, 96 N. E. 947, 42 L. R. A. (N. S.) 326; *Citizens Bank v. Leonhart* (1890), 126 Ind. 206, 210, 25 N. E. 1099; *Shirk v. Neible supra*; *State Nat. Bank v. Bennett* (1894), 8 Ind. App. 679, 683, 36 N. E. 551; *Thomasson v. Brown* (1873), 43 Ind. 203, 206; *Weyer v. Second Nat. Bank* (1877), 57 Ind. 198.

The appellant tendered several instructions in which it asked the court to instruct the jury that notice to appellant of defenses to the

10. note to be available to appellees must show bad faith or dishonesty on the part of appellant, also that evidence to overcome the presumptions of good faith on the part of the purchaser of a negotiable instrument payable at a

bank in this State, "must lead irresistibly and conclusively to the conclusion that the purchaser actually had knowledge of the defenses to the note at the time of its purchase"; also that to defeat a recovery by appellant "it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man". The court refused such instructions but gave a number tendered by both appellant and appellees. We are advised of no authority which supports appellant's contention as to the character of the notice to a purchaser of a promissory note, necessary to put him upon inquiry as to defenses thereto. The party having the burden of any issue in a civil action is required only to prove the same by a fair preponderance of the evidence bearing on such issue. The court instructed the jury in accordance with the principles of law above announced, and said in substance that, if appellant purchased the note in suit before maturity for a valuable consideration and without notice or knowledge of any defense thereto, available as against the payee, it makes no difference what representations were made to appellees as to said stock powder, "neither does it make any difference as to whether said stock powder was valuable or had any value whatever, nor does it make any difference as to the quality of such stock powder, such defenses could not be applicable as against" appellant. Also that if the appellant was such innocent purchaser for value before maturity it would make no difference if "the defendant was swindled in the transaction, and received no consideration for said note"; that the purchaser might rely upon the genuineness of the signatures of the makers of the note and was not required to call upon them and inquire as to defenses to the note, unless there

was something on the face of the note to arouse the suspicions of a reasonably cautious person or the purchaser had such actual or constructive notice or knowledge of possible defenses thereto as would put a reasonably cautious man on inquiry in regard thereto, and that in such case the indorsee is affected with knowledge of all that the inquiry would reasonably have disclosed. The court also instructed the jury that, on the issue of no consideration, the burden was on appellees to prove such defense by a fair preponderance of

11. the evidence. The instructions refused were either misstatements of the law applicable to the case or were fully covered by others that were given. The instructions as a whole gave the jury a full, fair and accurate statement of the law applicable to the case under the issues and evidence disclosed by the record. No available error is shown either in the giving or the refusal of instructions.

A new trial was also asked on the ground that the verdict of the jury is not supported by sufficient evidence; that there is no

12. evidence tending to show that the stock food sold appellees under contract and for which the note in suit was given was such as comes within the purview of the statutes of this State, regulating the manufacture and sale of such foods and medicines; that there is no evidence tending to prove that the contract and note of appellees were procured by fraud; that there was no consideration for the note or that appellants are not good-faith, innocent purchasers for value, before maturity, of the note in suit. Appellant purchased the note from the administratrix under an order of the court which disclosed the nature and character of the business of decedent, the

contract entered into by appellee, Joseph B. Hartman, and the fact that the note was given for the purchase of stock food under such contract. The contract shows the purchase of 35,000 pounds "of the Medical Chemical Company's powders" to be delivered at Danville, Indiana, for which appellees gave their note for \$2,700, due December 1, 1911. The contract also provides that "if the goods are not all sold by December 1, the time on such part of goods not sold to be extended till they are sold", and goes into details as to territory shipments, and resale of the powder. These and other facts disclosed by the evidence were sufficient to warrant the jury in inferring every fact essential to appellee's defense. Where different inferences

may be reasonably drawn from the evidence

13. and the jury has drawn the inferences necessary to support the verdict, this court will not reverse the judgment on the insufficiency of the evidence.

The appellee, Joseph B. Hartman, was permitted to testify to a conversation with the decedent,

William M. Doty, appertaining to the sale

14. of the stock food for which the note was given. Appellant objected on the ground that the death of one of the parties rendered the other incompetent under §521 Burns 1914, §498 R. S. 1881. As already shown, the note in suit was sold and transferred to appellant by the administratrix of the deceased owner. By such sale and assignment, the estate of the decedent was not made liable to appellant, either primarily or secondarily, as indorser or otherwise. The statute provides that: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allow-

ance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate." The administratrix was not a party to the issue or record and no judgment or allowance could "be made or rendered for or against the estate". The court did not err in admitting the evidence. *Durham v. Shannon* (1888), 116 Ind. 403, 405, 19 N. E. 190, 9 Am. St. 860; *Orndorf v. Jeffries* (1910), 46 Ind. App. 254, 257, 91 N. E. 608. The other questions relating to the evidence that are suggested do not show any ruling prejudicial to appellant. The fundamental question involved in the appeal is settled adversely to appellant by the case of *Beecher v. Peru Trust Co., supra*.

The issue relating to the right of appellant to enforce collection of the note as an innocent purchaser for value before maturity was fairly and impartially tried so far as disclosed by the record. No ruling prejudicial to any substantial right of appellant has been pointed out. Appellant's contentions are in the main based on views of the law that can not be sustained either on principle or authority, and do not justify further detailed consideration.

The merits of the cause seem to have been fairly tried and determined. No ground for reversal is shown. §§400, 401, 700 Burns 1914, §§391, 392, 658 R. S. 1881. Judgment affirmed.

NOTE.—Reported in 109 N. E. 846. As to the burden of proof in an action on bill or note with respect to defense of want of consideration, see 18 Ann. Cas. 205.

**BAKER, ADMINISTRATOR V. BALTIMORE AND OHIO
SOUTHWESTERN RAILROAD COMPANY.**

[No. 8,970. Filed March 31, 1916.]

1. **APPEAL.—Review.—Judgment on Answers to Interrogatories.**—In determining the correctness of the trial court's ruling sustaining a motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff, the court on appeal will not look to the evidence actually given in the case, but will search the pleadings to see if by any evidence possible under the issues such answers can be reconciled with the general verdict, and every possible reasonable inference and presumption deducible from evidence which might have been admitted in support of such verdict will be indulged in its favor. p. 456.
2. **APPEAL.—Review.—Harmless Error.—Interrogatories to Jury.—Concealed Assumption of Fact.**—In an action against a railroad company for the death of plaintiff's decedent in a crossing accident, interrogatories to the jury asking how far plaintiff's decedent could have seen the train which struck her, when she was certain distances from the track, had she looked in the direction from which the train was coming, improperly contained a concealed assumption that the train which struck decedent was within her range of vision, but the error was harmless in view of the fact that the trial court ignored the assumption and gave to the answers a construction as favorable to the general verdict as any fair interpretation of such interrogatories permitted. p. 459.
3. **APPEAL.—Review.—Answers to Interrogatories.—Presumption Favoring Verdict.**—On appeal from a judgment for defendant on the jury's answers to interrogatories notwithstanding a general verdict for plaintiff in an action for the death of plaintiff's decedent at a railroad crossing, the court must assume in favor of the general verdict that decedent looked for an approaching train. p. 460.
4. **RAILROADS.—Crossing Accidents.—Contributory Negligence.**—One who looks for an approaching train before attempting to cross the tracks can not be said to be guilty of negligence for not looking in the right direction at the precise place and time when and where looking would have been of the most advantage. p. 460.
5. **RAILROADS.—Crossing Accidents.—Duty to Look for Trains.**—While it is the duty of a person on approaching a railroad crossing to look in both directions for an approaching train, where the general verdict warranted the assumption that at least during part of the time in which plaintiff's decedent was traveling from a point fifty feet south of the track to such track, she was looking toward the east for an approaching train, it can not be said as a matter of law that she was negligent for looking in such direction rather than

in the direction from which the belated train which struck her was approaching. p. 461.

6. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Right to Assume Obedience to Law.*—A traveler about to pass over a railroad crossing has the right, within reasonable limits, to assume that the railroad company will signal the approach of its train to the crossing as required by statute, and that it will obey the provisions of an ordinance limiting the speed of trains. p. 462.
7. RAILROADS.—*Crossing Accidents.—Contributory Negligence.—Judgment on Answers to Interrogatories.—Review.—Presumptions.*—In an action against a railroad company for the death of plaintiff's decedent at a crossing, where the railroad company's negligence may have been responsible for the perilous situation of decedent and a confused condition of her mind resulting therefrom, the court on appeal, in reviewing the action of the trial court in sustaining a motion for judgment for defendant on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff, must presume in favor of the general verdict that such confused condition of mind did exist and that defendant's negligence was responsible therefor, in the absence of a finding of the jury to the contrary, and hence decedent should not be charged with contributory negligence for lack of prompt and intelligent action resulting from such condition of mind. p. 463.
8. RAILROADS.—*Crossing Accidents.—Negligence.—Question of Law.*—In an action for the death of plaintiff's decedent at a railroad crossing, where it appeared, in view of assumption warranted, that if decedent had looked west three and a half seconds before her injury and when at a point fifty feet from the track, she would have seen no train approaching, and that if her attention had then immediately been directed toward the east for only two or three seconds while she continued her approach to the crossing she would in all probability have been on the track within such time, and the approaching train could have been so close that escape was impossible, or at least so near that no appreciable time would have remained to her in which to determine and take intelligent action in view of her present and imminent peril, the question of negligence in decedent could not be determined as a matter of law, so as to sustain a judgment on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff. p. 464.

From Martin Circuit Court; *James W. Ogdon*, Judge.

Action by Daniel A. Baker, administrator of the estate of Phoebe Baker, deceased, against the Baltimore and Ohio Southwestern Railroad Com-

pany. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Frank E. Gilkison, for appellant.

W. R. Gardiner, C. K. Tharp, C. G. Gardiner, Fabius Gwin and Edward Barton, for appellee.

HOTTEL, J.—This is an appeal from a judgment against appellant in an action brought by him against appellee to recover damages on account of the death of Phoebe Baker, alleged to have been caused by appellant negligently striking her with one of its trains at Shoals, Indiana. Said Daniel A. Baker, the administrator, was the husband and only heir of the deceased Phoebe Baker.

A trial by jury resulted in a verdict for

1. appellant in the sum of \$1,000. With its general verdict, the jury returned answers to interrogatories. Appellee's motion for judgment thereon was sustained. The ruling on this motion is assigned as error and relied on for reversal. In determining the correctness of such ruling, this court will not look to the evidence actually given in the case, but will search the pleadings to see if, by any evidence possible under the issues, such answers can be reconciled with the general verdict, and every possible reasonable inference and presumption deducible from evidence which might have been admitted in support of such verdict will be indulged in its favor. *Lutz v. Cleveland, etc., R. Co.* (1915), 59 Ind. App. 16, 23, 108 N. E. 886; *Meyers v. Winona, etc., R. Co.* (1915), 58 Ind. App. 516, 106 N. E. 377.

The averments of the complaint which have a controlling influence on the question presented by the answers to interrogatories are in substance, as follows: On October 25, 1913, appellee's railroad, main track and sidetrack, crossed one of the

frequently traveled public streets of the west part of the town of Shoals, Indiana, and appellee was then operating one of its trains on its main line over and across such street. Immediately west of the crossing, the railroad track curves sharply to the north, and on the north side of the railroad and for a long distance west thereof there was, and is, a high hill which obstructs the view of such road west of the crossing for a distance of more than 250 feet. On the occasion in question, there was a train on the sidetrack west of said crossing about twenty yards, making it impossible to see approaching trains westward from said point for more than 150 feet. An ordinance of the town in force and effect at the time limited the speed of trains passing through such town to six miles an hour. At the time in question, appellee carelessly and negligently ran its train No. 8 operated by a locomotive engine, from the west toward, over and across the public crossing at the rate of 60 miles an hour, and in so doing negligently omitted to sound the whistle on said locomotive and negligently failed to ring the bell thereon from a point 80 rods west of the crossing to such crossing. Such train, on this occasion and for several months prior thereto, was due at the crossing at 2:29 p. m., and this fact was known to the public and to appellant's decedent. On the occasion in question, decedent, for the purpose of crossing the track, approached the crossing from the south in a careful and cautious manner about three o'clock p. m. At the same time appellee's train was approaching the crossing from the west. Because of the curve in appellee's track, the high hill on the north side thereof and the freight train on the sidetrack, decedent was unable to see such approaching train, and because of appellee's neglect and failure

to ring the bell and sound the whistle on its locomotive, decedent was unable to hear and did not hear such train, and decedent had no notice of such approaching train until she was on the track and it struck her, and while in the act of crossing such track, decedent was by appellee's negligence struck by the train and so seriously injured thereby that she died from such injuries three days later. Decedent would not have been injured but for appellee's negligence. Had the whistle been sounded or the bell rung, decedent would have heard the same and would have been warned of the approaching train and would not have gone on the track, and had the train been running within the speed limit provided by the ordinance, decedent could have escaped from the track and avoided her injury and death.

The interrogatories and answers thereto are as follows: "1. As the plaintiff's decedent, Phoebe Baker approached the railroad tracks of the defendant at the time and place where she was struck and killed how far could she have seen a train approaching from the west when she was fifty feet from such place, had she looked to the west? A. 100 yards * * * 2. How far could she have seen such approaching train when she was twenty-five feet from such track, had she looked in the direction from which the train was coming? A. 75 yards * * * 3. How far could she have seen such approaching train when she was ten feet from such track, had she looked in the direction from which the train was coming? A. 100 feet * * * 4. How far could she have seen the train which struck her, when she was at the south rail of the main track had she looked to the west? A. 150 feet * * * 5. At the time plaintiff's decedent was at the end of

the ties on the south side of the main track, could she not have seen the train which struck her had she looked to the west when it was as much as two hundred and fifty feet away from the place where she was struck? A. Yes. * * * 6. If you shall answer the fifth interrogatory in the negative, then state how far she could have seen such train had she looked? A. 250 ft."

It is asserted by appellant that interrogatories Nos. 4, 5 and 6 are deceptive and misleading, and for this reason were improper and should

2. not have been given. In support of this contention, appellant insists, in effect, that each of the last three interrogatories contains a concealed assumption that the train which struck and injured decedent was within the range of vision expected to be elicited by the answer of the jury to the particular interrogatory at the particular time decedent was at the point indicated in such interrogatory as the point concerning which the inquiry therein was made. Such interrogatories are, we think, subject to the infirmity suggested by appellant, but the infirmity is one which the trial court did, and this court can, obviate or cure by ignoring the partially concealed assumption contained in such interrogatories, and giving to the answers thereto a construction as favorable to the general verdict as any fair interpretation to which such interrogatories are susceptible will permit. When we give to said interrogatories such interpretation, the jury, by its answers thereto, found that if decedent, when approaching the appellee's track had looked to the west when fifty feet distant she could have seen the train 100 yards away, if such train, at that particular time, had in fact been within that distance; that when twenty-five feet from the track she, by then looking west,

could have seen such train seventy-five yards distant, if it in fact, at that particular time, had been within that distance; that when ten feet from the track she, by then looking west, could have seen the train 100 feet distant, if at such time such train had, in fact, been within that distance; that when on the south rail of the main track, if she had then looked west, she could have seen such approaching train 150 feet distant, if in fact such train had at such time been within that distance; that when at the end of the ties on the south side of the main track, she, by then looking west, could have seen such train 250 feet distant, if such train at such time, had in fact been within such distance. There is no finding that the train which struck appellant's decedent was, at either of the times to which the respective inquiries were directed, within the distance indicated by the answer to each particular interrogatory, nor is there any finding that decedent was at such particular time looking west, or in the direction of such approaching train, or that she saw such train at either of such points, and there is no finding that she did not look both ways and listen

for approaching trains. In view of the

3. issues, the law, applicable to the question under consideration, requires us to assume in favor of the general verdict, that decedent looked for an approaching train and, in view of

4. such assumption, it can not be said, as a matter of law, that decedent was guilty of negligence because she did not look in the right direction "at the precise place and time when and where looking would have been of the most advantage." *Cleveland, etc., R. Co. v. Lynn* (1909), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017. It

was decedent's duty under the law to look

5. in both directions and we may assume in favor of the general verdict that, at least during a part of the time in which she was traveling from the point fifty feet south of the track to such track, she was looking toward the east to discover if any train was approaching from that direction, and it can not be said as a matter of law that she was negligent for looking in such direction rather than in the direction from which the belated train which struck her was approaching. Upon this question, the Supreme Court in *Cleveland, etc., R. Co. v. Lynn, supra*, 594, 595, quotes with approval the following language from *St. Louis, etc., R. Co. v. Dillard* (1906), 78 Ark. 520, 94 S. E. 617: "Now in this case we are asked to say, as a matter of law, that, though the plaintiff brought his team almost to a standstill in twenty-five or thirty feet of the track, and carefully looked and listened both ways up and down the track, and no train was in sight for a distance of 200 yards to the west, and he started across, meanwhile listening for trains and looking toward the east where he specially apprehended danger, he was guilty of negligence in failing to look again toward the west while going that distance toward the track. So to hold would be, we think, to make the traveler the insurer of his own safety and deprive him entirely of the right of recovery for injury caused by the negligence of the railroad company unless he kept his eyes turned every moment, under all circumstances, toward the direction from which the train came." Since the passage of the act of 1899 (Acts 1899 p. 58, §362 Burns 1914), the burden of proving contributory negligence is on the defendant and while appellee was entitled to make such proof under its general

denial the plaintiff was also entitled to introduce any evidence that might tend to relieve her from the charge of such negligence, and hence may have introduced evidence which showed that, at the particular times and places indicated in the interrogatories, her attention was temporarily attracted elsewhere, thereby making such question one of fact for the jury, and the rule as to looking "is not inflexible and unvarying as to time and place, so as always, and under all circumstances, to require the case to be taken from the jury merely because the traveler might have seen the train if he had looked in the right direction at a particular instant from a particular place." *Cleveland, etc., R. Co. v. Lynn, supra*, 593, 594.

For the purposes of the question under consideration, we must assume that appellee's train approached the crossing where decedent was struck at a speed of sixty miles an hour in viola-

6. tion of an ordinance limiting such speed to six miles an hour and in violation of the State law requiring it to sound the whistle and ring the bell, etc. The decided "cases in this State recognize the doctrine that it is the right of the traveler, within reasonable limits, to assume that the railway company will obey the law; and while this does not relieve him from the exercise of due care, yet it may be a feature in determining whether due care was exercised." *Cleveland, etc., R. Co. v. Lynn, supra*, 594. See, also, *Cleveland, etc., R. Co. v. Rumsey* (1913), 52 Ind. App. 371, 376, 100 N. E. 782; *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426, 431, 30 N. E. 37. In *Cleveland, etc., R. Co. v. Lynn, supra*, the Supreme Court further said on this subject: "In the absence of some evidence to the contrary, we think the

appellee had the right to presume that the appellant would obey the city ordinance, and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred, and while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption. If when she looked to the north 400 feet and saw no train, she knew that she could cross the tracks in safety before a train running at the speed fixed by the city ordinance could reach her from that direction, it would be a harsh rule which would adjudge her guilty of negligence because she was struck by a train moving nearly five times as fast as the speed fixed by the ordinances of the city, which she had a right to presume the appellant would obey."

There is another fact of importance and controlling influence that should never be overlooked in a case of this character. It is a matter of

7. common knowledge that when a person is suddenly and unexpectedly confronted with certain and imminent peril, like that with which appellant's decedent was confronted, at the time in question, the avoidance of which necessitated immediate action, on her part, there may, and ordinarily does, result a mental confusion and hesitation that prevents that prompt and intelligent action which the emergency may demand in order that the peril may be avoided, and where, as in this case, the averments of the complaint show that the railroad company's negligence may have been responsible for such perilous situation, and said condition of mind resulting therefrom, this court, in the absence of a finding of the jury to the contrary, must presume in favor of the

general verdict that such condition of mind did exist and that appellee's negligence was responsible therefor, and hence that the party injured should not be charged with contributory negligence on account of a lack of prompt or intelligent action on her part resulting from such confused mental condition. "The circumstances in which persons are placed must necessarily be considered in determining the question of fact whether the required degree of care has been exercised, and it is obvious that persons placed in a position of peril where a course of conduct must be determined without any time in which to deliberate, can not be judged by the same rule applicable where there is ample time to determine what course to take to avoid danger." *Roberts v. Chicago, etc., R. Co.* (1914), 262 Ill. 228, 104 N. E. 708, 710. See, also, *Pittsburgh, etc., R. Co. v. Carlson* (1900), 24 Ind. App. 559, 564, 56 N. E. 251. Assuming that the train which struck decedent approached at the rate of sixty

8. miles an hour, it would have covered the greatest distance indicated by the answers to interrogatories, 100 yards, in a little less than three and a half seconds, so that if decedent had looked west three and a half seconds before her injury and when at a point fifty feet from the track we may assume that she would have seen no approaching train. If her attention had then immediately been directed toward the east for only two or three seconds while she continued her approach toward the track she would in all probability have been on the track within such time and the approaching train could have then been so close that escape was impossible, or at least so near that no appreciable time would have remained to her in which to determine and take intelligent

action in view of her present and imminent peril. "It is only when the standard of duty is fixed and certain, or where the measure of duty is defined by law, or when the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact." *New York, etc., R. Co. v. Hamlin* (1908), 170 Ind. 20, 39, 83 N. E. 343. See, also, *Town of Albion v. Hetrick* (1883), 90 Ind. 545, 547, 46 Am. Rep. 230; *Town of Newcastle v. Grubbs* (1908), 171 Ind. 482, 496, 86 N. E. 757. Negligence can be determined by the court as a matter of law only in those cases where but one inference can be drawn from facts proven. *Cleveland, etc., R. Co. v. Rumsey, supra*, 376.

In view of the evidence possible under the issues in this case, we can not say that the answers to interrogatories leave the question of decedent's negligence open to but one inference. On the contrary, such answers leave the question of contributory negligence open to different inferences, and hence can not override the general verdict returned by the jury. We think the ends of justice would be subserved by directing a new trial rather than by directing judgment on the verdict. The judgment below is therefore reversed with instructions to the trial court to grant a new trial and for such further proceedings as may be consistent with this opinion.

NOTE.—Reported in 112 N. E. 27. As to contributory negligence of person in stepping on track in front of approaching train, which is running in excess of speed prescribed by ordinance, see 3 L. R. A. (N. S.) 196. As to duty of traveler approaching railway crossing as to place and direction of observation, see 37 L. R. A. (N. S.) 135.

KIRK v. TRABUE ET AL.

[No. 8,999. Filed April 4, 1916.]

1. FRAUD.—*Burden of Proof.—False Representations.—Knowledge.*—In an action for damages for false representations in the sale of a horse, plaintiff must prove that defendant knew that the horse was not as represented, or that he was chargeable with such knowledge. p. 466.
2. NEW TRIAL.—*Newly Discovered Evidence.—Cumulative Evidence.*—A new trial will not be granted for newly discovered evidence which is merely cumulative, of the same kind and to the same point as that given at the trial. p. 467.
3. FRAUD.—*Parties.—Liability.—Evidence.*—In an action against two defendants for damages for fraudulent representations in the sale of a horse, where the evidence showed that one of the defendants had no interest in the horse, although the check given in payment for same was made payable to him, the court did not err in instructing the jury that a verdict should be returned in his favor. p. 468.

From Rush Circuit Court; *John D. Megee*, Judge.

Action by John F. Kirk against Samuel H. Trabue and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

John H. Kiplinger, for appellant.

Samuel L. Trabue and *Donald L. Smith*, for appellees.

IBACH, C. J.—This was an action for damages growing out of the sale of a horse, alleged to have been owned by appellees, and sold to appellant, at a public auction sale held by the Combina-

1. tion Sales Company. The evidence showed that appellee Harry Trabue stated at the sale that the mare was "sound and all right" as far as he knew. It also appeared that the mare was not sound, but was moon-eyed, and that moon-eyed horses become blind eventually. The theory of the complaint is to recover damages for

false representation and, in order to make out such theory, it was incumbent on appellant to prove that appellee, Harry Trabue, knew the mare was not sound, or was chargeable with such knowledge, when he made the above quoted statement.

The first error assigned is in overruling appellant's motion for new trial on account of newly discovered evidence. The substance of the evidence set

out in such motion was that one person

2. heard Harry Trabue say shortly before the sale that the mare in controversy had distemper and looked as if she was affected in the eyes, and that another heard Harry Trabue say about the same time that there was something the matter with the mare's eyes, and that he was going to see Dr. Huber about them. There was evidence given at the trial by one witness that Harry Trabue said he was going to sell the mare, and would have to do something for her eyes before he could sell her to advantage, and that he had a veterinary give her treatment for two weeks before the sale, and another witness had helped him put medicine in her eyes, and Harry Trabue himself admitted that he had treated her eyes with medicine shortly before the sale. Thus, evidence of the same kind as that which was alleged to have been discovered, and to the same point, was given at the trial. "Evidence of the same kind to the same point is cumulative, and evidence of verbal admissions is of the same kind when other verbal admissions to the same point were proved on the trial." *Hines v. Driver* (1885), 100 Ind. 315, 329. The principle is settled that a new trial will not be granted for newly discovered evidence which is merely cumulative, and the evidence for which such trial was sought in the present case is cumulative.

Error is also assigned because the court instructed the jury that the evidence showed that Samuel H.

Trabue at the time of the sale had no interest

3. in the mare, and a verdict should be returned in his favor. There was evidence that Harry Trabue bought the mare and gave a note for her which he afterward paid by check. This note was in evidence. Harry Trabue said he owned the mare and his father (appellee Samuel H. Trabue) had no interest in her. Samuel H. Trabue stated that he had no interest in the mare. She was entered at the sale in the name of Harry Trabue, and sold for him. It was alleged in the complaint that both appellees were the owners of the mare, but there were no allegations showing any fraud on the part of Samuel H. Trabue. There was evidence that the check by which appellant paid for the mare was made out to Samuel H. Trabue, for the reason given that Harry Trabue had gone home from the sale at the time. This is not evidence from which the jury would be permitted to infer that Samuel H. Trabue was a part owner of the mare, in the absence of any other evidence to show such fact. The court did not err in the instruction above mentioned. Judgment affirmed.

NOTE.—Reported in 112 N. E. 26. As to right of action for false representation, see 18 Ann. St. 555. As to presumption and burden of proof as to fraud, see 1 Ann. Cas. 809. As to what is cumulative evidence within the rule excluding it when offered as newly discovered evidence in support of a motion for new trial, see Ann. Cas. 1913 D 157.

EIKENBERRY v. THORN, ADMINISTRATOR.

[No. 9,166. Filed April 4, 1916.]

1. DAMAGES.—*Liquidated or Penalty.—Construction.—Intent.*—The provisions of a contract relating to the damages that may result from its breach are to be interpreted so as to carry out the intent of the parties when they executed the instrument. p. 474.

2. **DAMAGES.—Liquidated.—Stipulation Controlling.**—Where it appears from the whole instrument that the parties knowingly mutually agreed in advance upon a definite amount to be paid in case of a breach or repudiation of the contract, such agreement will control unless it is inconsistent with other provisions of the contract, or is unreasonable or unconscionable in view of the probable damages that may result from a breach. p. 475.
3. **DAMAGES.—Liquidated or Penalty.—Words Used.**—In determining the question of whether a contract provides for the payment of liquidated damages in case of its breach, or a penalty merely, the use of particular words or phrases, such as “damages”, “penalty”, “forfeit”, “liquidated damages”, and the like is not conclusive, but the words or phrases used are to be considered in connection with the other provisions of the contract. p. 475.
4. **DAMAGES.—Liquidated.—Enforcement.**—Where the parties have deemed it difficult to determine the actual damages in case of a breach of their contract, or for some other reason satisfactory to them and mutually understood at the time, have deemed it advisable to agree upon a sum, in advance of such possible breach, as liquidated, and have advisedly so stipulated in the contract, the courts will respect and enforce such stipulations. p. 475.
5. **DAMAGES.—Liquidated or Penalty.—Any of Several Acts.**—Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and provides for the payment of a definite sum upon a violation of any or all of such provisions, and the sum stipulated would be in some instances too large and in others too small a compensation for the loss of injury sustained, the stipulated amount will be regarded as a penalty and not as liquidated damages. p. 475.
6. **DAMAGES.—Liquidated or Penalty.—Doubt.**—Where the contract leaves the question in doubt, the amount stipulated to be paid in case of a breach will generally be construed as a penalty rather than as liquidated damages, since the party may still recover the actual damages sustained by the breach. p. 475.
7. **DAMAGES.—Penalty.—Breach of Contract.**—Where a contract for the exchange of mercantile stock for real estate provided for the doing of numerous things of varying importance, such as the furnishing of an abstract in five days, the exchange of insurance, the assignment of a lease, the delivery of the deeds within a specified time, etc., the provision that “both parties further agree that should either one fail to comply with the conditions herein he will pay the other \$3,000 in damages”, was subject to the interpretation that failure to comply with any one of the requirements would subject the defaulting party to the payment of damages, or at least was not free from doubt as to whether it was intended to fix the amount of damages only in case of a total failure to close the deal in substantial compliance with the contract, and hence must

be deemed as providing a penalty rather than liquidated damages. p. 476.

8. DAMAGES.—*Breach of Contract.—Complaint.*—A complaint for breach of contract providing a penalty of \$3,000 for its breach, alleging the several obligations of the contracting parties and averring that defendant has failed and refused to comply, to plaintiff's damage in the sum of \$3,000, was not insufficient as the statement of a cause of action for actual damages, although it also stated facts that would have been sufficient for a recovery on the theory of liquidated damages, had the contract so provided. p. 477.
9. PLEADING.—*Complaint.—Demurrer.*—Where the facts stated in a complaint are sufficient to entitle plaintiff to any substantial relief it is not subject to demurrer. p. 478.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by William H. Eikenberry against Alonzo Thorn, administrator of the estate of Philip B. Yoars, deceased. From a judgment for defendant the plaintiff appeals. *Reversed.*

Blacklidge, Wolf & Barnes, for appellant.

Charles L. DeVault and *Antrim & McClintic*, for appellee.

FELT, P. J.—This suit was commenced by appellant to recover damages alleged to be due him from appellee's decedent for the breach of a contract. The court sustained a demurrer to the complaint and, appellant refusing to plead further, judgment was rendered against him, from which he has appealed. The action of the court in sustaining the demurrer to the complaint is the error assigned and relied on for reversal.

The complaint is in substance as follows: On January 11, 1912, appellant and the decedent, Philip B. Yoars, entered into a contract by the terms of which decedent agreed to convey to appellant by warranty deed 116 acres of real estate in Miami County, Indiana, subject to an encumbrance of \$4,000, at the price of \$145 per acre.

In consideration of such conveyance, appellant agreed to transfer to Yoars by bill of sale a stock of goods and fixtures located at Kirkland, Indiana, and a stock of hardware and fixtures located at Kokomo, Indiana. The complaint alleges the substance of the contract which is made a part of the pleading by exhibit and provides that should either party fail to comply with all the conditions of the agreement, he should pay to the other \$3,000 in damages. It is alleged that decedent failed and refused to comply with the contract and that appellant complied with it as far as possible and had been at all times ready and willing to comply fully therewith; that decedent refused to make invoice of the goods as provided in the contract or to take any steps whatever to carry out the agreement and absolutely repudiated the contract. "That the said plaintiff has been damaged by said failure and refusal of the defendant to carry out said contract in the sum of three thousand dollars, for which he demands judgment," and all other proper relief.

The contract is as follows:

"This agreement, made and entered into this 11th day of January, 1912, by and between Philip G. Yoars, of the county of Miami, and State of Indiana, party of the first part, and William H. Eikenberry, of the county of Howard, and State of Indiana, party of the second part, Witnesseth, That the party of the first part for and in consideration of the covenants and agreements hereinafter specified, to be by the party of the second part well and truly performed, hereby agrees to convey to said party of the second part, or his heirs, by warranty deed, from himself and wife, the following described property, situated in the county of Miami, in the State of Indiana, to-wit: One hundred and sixteen

acres of land which is the land said first party bought from Joel Bryant and Henry Powell and will be fully described in deed when conveyed to said second party by proper legal description, this land is to be conveyed subject to the mortgage encumbrance of \$4,000 drawing interest at five per cent per annum, payable semi-annually, this land is also conveyed subject to the taxes due and payable in the year of 1913, also subject to the tenant's lease now on the farm, which said first party agrees to assign to said second party, said lease expires March 1, 1913. Both parties agree that the price on the land is \$145 per acre and whichever party owes any difference they agree to pay the other party by bankable note, due in two, four, and six months, equal payments drawing six per cent interest. And the party of the second part, for his part, for and in consideration of the covenants and agreements above specified being by the party of the first part well and truly performed hereby agrees to convey to said party of the first part, or his heirs, by bill of sale, from himself, the following described property, situated in the county of Clinton and Howard, in State of Indiana, to-wit: All stocks of goods and fixtures, consisting of general merchandise, located in the John H. Hartman building in Kirkland, Indiana, and also all the stock of hardware and fixtures located in the Bell & Purdum building on the north side of the square in Kokomo, Indiana, which was formerly known as the J. P. Owen Hardware Store. Both parties hereto agree that the above mentioned stocks are to be invoiced at the original wholesale cost price f. o. b. shipping point, no discount of any kind to be allowed except as hereinafter stated. Said second party agrees to invoice both safes at \$145, and allow fifteen per cent on the balance of the fixtures in both stores from what they originally cost, all the balance to be invoiced

straight as above stated, allowing no discount whatever, except one hundred dollars from the total inventory which is to cover damaged goods of all kinds. It is hereby further mutually agreed and understood by and between the parties hereto, and as a part of the consideration of this agreement, that said first party shall furnish proper abstract showing merchantable title to the property hereby agreed by him to be conveyed, and that second party hereby agrees to furnish proper bill of sale showing the merchandise clear of encumbrance hereby agreed by him to be conveyed, and that said first party hereby agrees to furnish the said abstract for examination within five days from this date. Both parties agree to exchange insurance and pay whatever difference there may be. Both parties further agree that should there be any hardware in the lot that is being shipped from West Baltimore, Ohio, that is damaged, it shall be invoiced at what it is worth, also said first party agrees to take over the lease on the Kirkland storeroom, which said second party agrees to assign over, lease for \$60 a month. Both parties further agree that should either one fail to comply with all conditions herein he will pay the other three thousand dollars in damages, each party hereto agrees to furnish a man to invoice and if the invoicers cannot agree they are to call in a third party to decide the difference according to this agreement, invoices subject to change. It is mutually agreed that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties hereto. All deeds to be delivered and this negotiation to be closed within fifteen days from the date of this agreement. The parties hereto agree to leave the invoicing entirely to the invoicers and not to interfere in any way. Time is hereby declared to be the

essence of this agreement. In witness whereof, the said parties herein have hereunto set their hands and seals the day and year first above mentioned. Both parties agree to put up all papers in escrow with Marshall Smith of Amboy, Indiana, before starting invoicing. Philip B. Yoars, William H. Eikenberry."

The demurrer was for insufficiency of the facts alleged to state a cause of action. The memorandum states that (1) it is not alleged that plaintiff has suffered any special damages by reason or on account of the breach of contract; and (2) that "the terms of the contract are not sufficiently specific to constitute a basis for a cause of action." The appellant urges two propositions in its points and authorities, viz., (1) the complaint shows a right to recover \$3,000 liquidated damages; (2) it is good against the demurrer, if the contract does not stipulate liquidated damages. Appellee contends that the contract provides a penalty for its breach and should not be construed as an agreement for liquidated damages in the sum of \$3,000; that the complaint is insufficient to warrant a recovery on the theory of actual damages provable on the theory of a penalty.

So much has been written in text-books and decisions on the subject of penalties and liquidated damages that we shall not attempt to restate all the rules and principles that bear upon the particular question to be decided but shall only attempt

to refer to those that seem to be most pertinent. In construing the provisions of a contract relating to damages that may result from its breach, such stipulations, like all other provisions of written contracts, are to be so interpreted as to carry out the intent of the

parties when they executed the instrument.

2. If it appears from the whole instrument that the parties knowingly, mutually agreed in advance upon a definite amount to be paid by the defaulting party to the other in case of a breach or repudiation of the contract, such agreement will control, unless it is inconsistent with other provisions of the contract, or is unreasonable or unconscionable in view of the probable damages that may result from a breach of such

3. contract. The use of particular words or phrases, such as, "damages", "penalty", "forfeit", "liquidated damages", and the like is not conclusive, but they are to be duly considered in connection with the other provisions of the contract in determining whether the stipulation as to damages in case of a breach shall be considered as a penalty or as liquidated damages. If the parties have deemed it difficult to determine

4. the actual damages in case of a breach, or for some other reason satisfactory to them and mutually understood at the time, have deemed it advisable to agree upon a sum, in advance of such possible breach, as liquidated damages, and have advisedly so stipulated in the contract, the courts will respect and enforce such stipulations.

Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and pro-

5. vides for the payment of a definite sum upon a violation of any or all of such provisions, and the sum stipulated would be in some instances too large and in others too small a compensation for the loss or injury sustained, the stipulated amount will be regarded as a penalty and not as liquidated damages. If the contract

6. leaves the question in doubt, the specified amount will generally be construed as a

penalty rather than as liquidated damages, since such interpretation can not be harmful, because the party is thereby permitted to recover his actual damages if he has sustained any by such breach.

The clause which is directly involved here provides that, "Both parties further agree that should

either one fail to comply with the conditions herein he will pay the other \$3,000 in damages." The contract provides that, after invoicing the stocks of goods and determining their value and the value of the land in the manner provided, "whichever party owes any difference they agree to pay the other party by bankable note". The abstract was to be furnished in five days. Insurance was to be exchanged and the difference in value paid. A lease on one of the stores was to be assigned. The deeds were to be delivered and the deal closed within fifteen days and time is declared to be the essence of the agreement. The contract states the amount to be paid "should either one fail to comply with all conditions herein." This language is subject to the interpretation that failure to comply with any one of the requirements of the contract will subject the defaulting party to the payment of damages. The things to be done under the contract are numerous and differ in importance. If the stipulation is for liquidated damages, the recovery must be the same in amount, whether the breach be for the least important stipulation or for a total repudiation of the contract. If it be said that the language may be so interpreted as to show an intention to fix the amount of damages only in case of a total failure to close the deal in substantial compliance with the contract, it can not be said that such interpretation is free from doubt and that it is the plain meaning of the language

employed. If there is doubt it must be resolved in favor of the interpretation which holds the stipulation to be a penalty requiring proof of actual damages to warrant a recovery. As supporting our conclusion that the stipulation for damages is a penalty and not liquidated damages, we cite the following: 1 Pomeroy, Eq. Jurisp. (3d ed.) §§440-445. 1 Sedgwick, Damages (9th ed.) §§405-413. *Zenor v. Pryor* (1914), 57 Ind. App. 222, 226, 106 N. E. 746, and cases cited. *Burley Tobacco Society v. Gillaspy* (1912), 51 Ind. App. 583, 588, 100 N. E. 89; *Barber Asphalt Pav. Co. v. City of Wabash* (1909), 43 Ind. App. 167, 174, 86 N. E. 1034; *Mondamin, etc., Dairy Co. v. Brudi* (1904), 163 Ind. 642, 648, 72 N. E. 643; *Howard v. Adkins* (1906), 167 Ind. 184, 191, 78 N. E. 665; *J. I. Case, etc., Mach. Co. v. Souders* (1911), 48 Ind. App. 503, 505, 96 N. E. 177; *Mount Airy, etc., Grain Co. v. Runkles* (1912), 118 Md. 371, 84 Atl. 533, L. R. A. 1915 E. 373, and cases cited; *Sun Printing, etc., Co. v. Moore* (1901), 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366.

The memorandum accompanying the demurrer states that the averments do not show that the plaintiff has suffered any special damages

8. by the alleged breach of contract. The complaint sets out the several obligations of the contracting parties and avers that the defendant has failed and refused to comply with the contract and has wholly repudiated the same; that the plaintiff has complied as far as possible therewith and is and has been at all times ready and willing to fulfill his part of the agreement; that the plaintiff "has been damaged by said failure and refusal to carry out said contract in the sum of \$3,000." The complaint therefore states a cause of action for actual damages. True

it also states facts which would be sufficient to recover on the theory of liquidated damages, if the contract so provided. If the complaint had been drawn wholly on the theory of liquidated damages, it would have been sufficient to show the breach of the contract without alleging actual damages. The complaint proceeds upon the theory that the contract was breached and repudiated in its entirety and that the damages sustained by the plaintiff amount to \$3,000. The averment of actual damages is not related to the stipulation for damages in the contract. The fact that the amount stated happens to be the same as the amount stated in the contract is only an unimportant coincidence, as any other sum would have served the same purpose in the pleading. The memorandum called attention to the averments showing actual damages and we must therefore conclude that the trial court held the complaint insufficient to state a cause of action on any theory. *Jonas v. Hirshburg* (1897), 18 Ind. App. 581, 587, 48 N. E. 656; *Richter v. Meyers* (1892), 5 Ind. App. 33, 34, 31 N. E. 582; *Neal v. Shewalter* (1892), 5 Ind. App. 147, 153, 31 N. E. 848; *Dwiggins v. Clark* (1883), 94 Ind. 49, 56, 48 Am. Rep. 140; *Chicago, etc., R. Co. v. Lawrence* (1907), 169 Ind. 319, 324, 79 N. E. 363, 82 N. E. 768; 5 Ency. Pl. and Pr. 737 *et seq.* Where the facts stated in a complaint are sufficient

to entitle the plaintiff to any substantial

9. relief it is not subject to demurrer. *Gowdy Gas Well, etc., Co. v. Patterson* (1902), 29 Ind. App. 261, 263, 64 N. E. 485; *Scott v. Cleveland, etc., R. Co.* (1896), 144 Ind. 125, 128, 43 N. E. 133, 32 L. R. A. 154; *Decker v. Yohe* (1913), 179 Ind. 243, 245, 100 N. E. 756; *Tishbein v. Paine* (1913), 52 Ind. App. 441, 443, 100 N. E. 766; *Oolitic Stone Co. v. Ridge* (1908), 169 Ind. 639, 643, 83 N. E. 246.

For the error in sustaining the demurrer to the complaint, the judgment is reversed with instructions to overrule the demurrer, to permit the parties to amend their pleadings if they desire so to do, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 112 N. E. 112. As to liquidated damages generally, and intention of parties in that connection, see 85 Am. St. 835; 108 Am. St. 50. As to whether a stipulated forfeiture for breach of contract is a penalty or liquidated damages, see 1 Ann. Cas. 244; 10 Ann. Cas. 225; Ann. Cas. 1912 C 1021.

WEST v. NATIONAL CASUALTY COMPANY.

[No. 8,747. Filed April 4, 1916.]

1. TRIAL.—*Directing Verdict.*—The direction of a verdict for defendant is not proper unless there is a total absence of evidence upon some issue or fact essential to recovery by plaintiff, or unless the evidence is without conflict and, when considered in its entirety, with all reasonable and legitimate inferences which the jury may properly draw therefrom, is susceptible of no other inference than that necessitating the directing of the verdict. p. 483.
2. INSURANCE.—*Forfeitures.*—Forfeitures of right to insurance are not favored in the law, and will be enforced only where there is the clearest evidence that such was the intention of the parties. p. 489.
3. INSURANCE.—*Forfeiture.—Estoppel.*—Where an insurance company, by its course of dealings with the insured and others known to the insured, has induced the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture. p. 489.
4. INSURANCE.—*Forfeiture.—Estoppel.—Time of Paying Premiums.*—Where an insurer by any agreement, either express or implied from its acts and conduct, causes the insured to honestly believe that it will receive the premiums after the time fixed in the policy and keep the policy alive, it is thereby estopped from asserting a forfeiture provided in the policy for failure to pay at the specified time, on account of a delay in payment induced by such agreement and the premiums paid and received in accord therewith. p. 490.
5. INSURANCE.—*Forfeiture.—Estoppel.—Power of Agent.—Extending Time of Paying Premiums.*—Under the rule that a principal is charged with any act or contract of the agent within the general

scope of his apparent authority, the agent of an insurance company having authority to accept payment of premiums and issue renewal receipts, thereby in effect extending or renewing the policy for the period covered by the renewal receipt, necessarily has authority to extend the time of payment of such renewal premiums, notwithstanding a stipulation in the policy to the contrary, so as to estop the company from asserting a forfeiture grounded on a failure to pay at the time provided in the policy, induced by the acts and conduct of such agent. pp. 492, 495.

6. **INSURANCE.—Provisions of Policy.—Waiver.**—The express provisions in a policy of insurance that no agent has authority to change the policy or waive any of its provisions, may be waived by an agent of the company acting within his actual or apparent authority. p. 493.
7. **INSURANCE.—Knowledge of Agent.**—The knowledge of an insurance agent acquired while acting for his company in connection with a matter in which he is authorized to act, will be imputed to the company. pp. 494, 495.
8. **INSURANCE.—Renewal Premiums.—Extending Time of Payment.—Injury Before Payment.**—The fact that payment for the monthly renewal premium was made after the insured was injured did not destroy his right to make it under an arrangement with the agent, pursuant to which he had for a long time been acting, that payments might be made at any time before the tenth of the month, especially in the absence of any evidence of collusion or fraud between them, or that he had before the injury determined that he would make no more payments. p. 498.
9. **INSURANCE.—Renewal Premiums.—Condition of Receipt.—Jury Question.**—Whether insured's renewal premiums were received, and his insurance continued, under a clause of the policy providing for temporary suspension of liability if such premium was not paid at a specified time, or whether they were paid and received under an arrangement waiving strict compliance with the policy as to time of such payments, is a question for the jury; the evidence thereon not being undisputed. p. 498.

From St. Joseph Superior Court; *Samuel Parker*,
Judge *Pro Tem*.

Action by Frank West against the National Casualty Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

Slick & Slick, for appellant.

Gaylord H. Case and *Philip H. Quinlan*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in a suit brought by appellant on an industrial insurance policy. The complaint is in two paragraphs. The averments of the first paragraph are in substance as follows: On July 6, 1910, appellee, by its policy of insurance for the consideration therein provided, insured appellant for one month from the date of such policy, and "for such further monthly periods, stated in the renewal receipts as the payment of premiums specified in said receipts would maintain said policy in force." By such policy appellee promised that in the event of an injury to appellant caused in the manner and resulting in the disability therein provided, appellee would pay to appellant the sum of \$50 per month so long as appellant should be so disabled, and for any partial disability of the character mentioned in the policy \$25 a month during the continuance thereof, not to exceed six months; that such policy is made part of the complaint as exhibit "A"; that thereafter appellant continued such policy in force by continued payment of the renewal premiums until his injury as hereinafter described; that such premiums were paid to W. A. Hyslop, appellee's agent at Boyne City, Michigan, who issued to appellant renewal receipts therefor; that the renewal receipt for the month of July, 1912, is attached to and made part of the complaint and marked exhibit "B"; that, after the execution of the policy of insurance, it was agreed between appellant and Hyslop that the renewal premiums on said policy would be received by him, Hyslop, in appellee's behalf, "at any time before the 10th day of each calendar month, on which date the amount is remitted" to appellee; that appellant thereafter in compliance with such under-

standing paid to Hyslop the monthly premiums on said policy at various times between the first and tenth of each calendar month; that the monthly renewal premiums for the months of April, May and June of the year 1912, were paid for each of said months respectively as follows, viz., the April premium was paid April 8, the May premium May 8, and the June premium June 10, 1912; that these premiums were each accepted by Hyslop and appellee, and renewal receipts were issued to appellant therefor by Hyslop which receipts are in all respects, except as to date, identical with exhibit "B" hereto attached, and were each antedated, that is to say, each of said receipts was dated back to the first of each month respectively; that the renewal premium on the policy for the month of July, 1912, was paid by appellant to Hyslop and appellee on July 7, 1912, and Hyslop thereafter, and in behalf of the company, issued its renewal receipt therefor to appellant which is herewith attached and marked exhibit "B"; that Hyslop did not antedate such July receipt back to the first day of July, but dated it July 13, which was six days after its actual receipt by him; "that on said seventh day of July, and for several months prior thereto, this plaintiff relied upon the practice and custom of said Hyslop and defendant of receiving renewal premiums on the policy at any time before the tenth of each calendar month, and was induced by said practice and custom to believe, and at said time did believe that defendant would receive and accept his premium on the policy at any time before the eleventh of each calendar month, without issuing a renewal receipt for such payment, and continue the policy in full force and effect from the first of each calendar month." Averments follow showing that on July 8, 1912,

appellant received a personal injury caused by external, violent and accidental means, and showing the character of the injury, the disability resulting therefrom, the notice given to appellee; that appellant performed all the conditions of the policy on his part to be performed, etc., which averments have no controlling influence on the questions presented by the appeal, and hence are not set out.

The second paragraph is practically the same as the first, except that it alleges that the payment of the July renewal premium was made on July 8, 1912, and that on July 10, 1912, and for several months prior thereto it was appellee's practice and custom to accept monthly premiums on said policy and to issue renewal receipts therefor at any time before the tenth of each calendar month, and thereupon to continue such policy in force and effect; that appellant relied on such custom and was induced thereby, etc., continuing substantially as the first paragraph.

A demurrer to each paragraph of the complaint was overruled. There was an answer in denial and an affirmative answer, to which there was a reply in denial. The cause was submitted to a jury and at the conclusion of the evidence, the trial court peremptorily instructed the jury to find for appellee, which it did. Appellant filed a motion for new trial which was overruled and this ruling is assigned as error and relied on for reversal. This motion contains two grounds, each of which, in different form, predicates error on the action of the trial court in giving the peremptory instruction. It is well settled by the decisions of both the Supreme

1. Court and this court, that such an instruction, in favor of the defendant, is never proper or authorized except in cases where there is a

total absence of evidence upon some issue or fact essential and necessary to the plaintiff's right to recover, or where there is no conflict in the evidence, and, when considered in its entirety, such evidence, with all reasonable and legitimate inferences which the jury might properly draw therefrom, is susceptible of but one inference, viz., an inference which necessitates the verdict so directed. *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 421, 103 N. E. 20, and cases cited; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 425, 73 N. E. 899; *Patterson v. Southern R. Co.* (1913), 52 Ind. App. 618, 620, 99 N. E. 491; *Premier Motor Mfg. Co. v. Tilford* (1916), ante 164, 111 N. E. 645. Appellee, in effect, concedes the law to be as above stated, and insists that the evidence in the instant case fails to establish a fact necessary and essential to appellant's right to recover, viz., that it fails to show that appellant performed the condition of the contract of insurance on his part to be performed, which required the monthly premiums to be paid on the first day of each calendar month, and that by such failure to pay his premium on July 1, 1912, appellant forfeited his right to recover on such policy, for an accidental injury resulting to him. July 8, following.

The evidence on this branch of the case is practically undisputed and consists of the policy of insurance, the application therefor, the four premium renewal receipts issued by appellee on the policy in question for the months of April, May, June and July, 1912, respectively, a letter from appellee to appellant, a letter from appellee's agent Hyslop to appellant, and the oral evidence of appellant, his wife, and attending physician. The policy bears date July 6, 1910, and its provisions

affecting the question presented by this appeal are as follows:

“(T) The premiums hereon must be paid either at the Home Office of the company, Detroit, Michigan, or to a person designated in writing by an officer of the company to receive them; and if paid to any other person, such payments shall not be binding on the company. (U) No agent has any authority to change this policy or to waive any of its provisions, conditions or limitations. Notice to or from any agent, or any knowledge, promise or statement made by him, or understanding with him, shall not be held to effect a change or waiver of any of the provisions, conditions, or limitations hereof. (W) If the payment of any renewal premium shall be made after the expiration of this policy, or of the last renewal receipt, neither the assured nor the beneficiary will be entitled to indemnity for any accidental injury happening between the date of such expiration and noon (Standard Time) of the day following the date of the receipt of such renewal payment at the Home Office; nor any illness originating before the expiration of thirty days after the date of such renewal payment. The acceptance of any renewal premium shall be optional with the company. * * * No assignment or change of this policy or waiver of its provisions shall be valid unless agreed to in writing by the president or secretary of the company and endorsed thereon.”

The provisions of the application affecting the question presented are as follows:

“If any condition or provision required by such contract shall not be fulfilled * * * then the contract shall be null and void and all money paid thereon, shall be forfeited to the company, and I agree that my acceptance of the policy hereon issued shall be evidence of my

acquiescence in all the statements, agreements and warranties herein set forth, and that the company shall not be bound by statements, made to or knowledge acquired by agents or solicitors, nor by any statement made by any agent or solicitor, not written in this application * * * I further agree to accept the policy subject to its provisions, conditions (and) limitations.”

The renewal receipt, exhibit “B,” for the month of July is as follows:

“This receipt is not valid unless dated and countersigned by the agent authorized to receive the premium as per notice sent by the company. \$300,000 Capital and Surplus. \$100,000 deposited with the State Treasurer for the Protection of Policy Holders. National Casualty Company, Detroit, Michigan. Received of Frank West the sum of two—60-100 dollars, continuing in force Policy No. C218466 for the term of one months, from noon, Central Standard time, of July 1, 1912, provided that the statements and warranties in the original application were true when made, and are true to this date. National Casualty Company, H. S. Curtis, Treasurer. Countersigned at Boyne City. Date July 13, 1912. W. A. Hyslop, Agent. Premiums accepted subject to the conditions of the policy.”

The renewal receipts for April, May and June are identical with that of July, *supra*, except as to date from which insurance is continued and date of countersigning. Each of these dates on each receipt is the first of the respective months for which the premium was paid.

The letters from appellee and Hyslop are as follows:

“July 22, 1912, Frank West, Mishawaka, Ind. Dear Sir: We have your claim before

us and beg to say that *we have just ascertained from Mr. Hyslop, the collector, that you did not pay your premium until the 10th of July, and as you were hurt on July 7th you are, therefore, not entitled to benefits because you were not insured at the time of your injury; consequently, we can not favorably consider your claim.* Yours very truly, National Casualty Company, J. L. Hepburn." (Our italics.)

"Boyne City, Mich., 7/25, 1912. Mr. Frank West, Mishawaka, Ind. Dear Frank: Replying to yours of July 23rd, will say I received a letter from the company a few days ago saying they had received notice of a claim from you *but hadn't received my July report as to whether you had paid your July premium.* My report passed their letter on its way to Detroit. I wrote them giving dates when your remittance was received *which of course appeared on report as well* (our italics) I also said your remittance to me was mailed in your town July 7th as near as I could remember. Of course strictly speaking your remittance should reach me by the first of each month to keep you in good standing. *My report rarely leaves here before the 10th of each month—finding it a hard job to make my collections before that time,* but I am not sure the company holds them in good standing till the report is made. They may consider your policy had lapsed. I am merely a collector—having nothing whatever to do with adjustment of claims. I can't see however, why they don't answer your letters & feel sure they will & I also hope your claim will be recognized & a satisfactory adjustment made. Yours, W. A. Hyslop."

The oral evidence of appellant affecting the question involved is as follows: "The policy in suit was obtained from appellee's agent, Ira Hilton, and the first premium was paid to him. After this, all premiums were paid to W. A. Hyslop.

On the second of the month after taking out the insurance I went to Mr. Hyslop and tendered him the monthly premium and he refused to take it saying that *'he had no blanks for receipts, and that any time from the first to the tenth of the month was suitable for the premium because he didn't send in his statement until then.'* After this I paid my premiums to Mr. Hyslop and paid them *all the way from the first to the tenth* of each month, and he always sent me a receipt. The premiums for the months of April, May and June, 1912, were each respectively paid by a money order mailed to Hyslop at Boyne City from Newberry, Michigan, on the following days of each of said months, respectively viz., April 8th, May 8th and June 10th, 1912. The premium for July, 1912, was paid on July 8th by money order sent through the mail from Mishawaka to Boyne City. The distance between Mishawaka and Boyne City is 350 or 400 miles. In ordinary course of mail it takes a letter about a day to go from one city to the other. I was injured on July 7, 1912, and notified appellee on July 9, 1912. [Witness identifies letters, *supra*, as letters received by him.] At the time the policy was written, Mr. Hilton, to whom the first premium was paid, told me to make my payments to Mr. Hyslop. The way I know that, the May premium was paid on May 8th, I have a duplicate in the post office at Newberry showing when all these receipts were paid * * * Mr. Slick [appellant's attorney] has it. I know it was paid after the first because I made a practice of doing that. I think I had the conversation with Mr. Hyslop as to when I should pay premiums when I went to pay my second premium in August, 1910." Appellant's wife testified to sending the premiums for July, June and May, 1912, in the manner and

on the days testified to by Mr. West, *supra*. The only evidence on behalf of appellee was that of appellant in which he admitted that appellee offered to refund to him the July premium and that he did not accept it; also the receipt of the clerk of the court for \$2.60 as a tender of such premium.

Does this evidence conclusively show that appellant, prior to his injury forfeited his right to insurance under his policy? Upon this ques-

2. tion, appellant has in his favor the fact that forfeitures are not favored in the law. Indeed, as a general rule, results flowing therefrom are regarded as so odious that a forfeiture will be enforced "only where there is the clearest evidence that such was the intention of the parties," and to avoid such odious result, the courts "are not slow in seizing hold of such circumstances as may have been acted on in good faith and which indicate an agreement on the part of the company, or an election to waive strict compliance with the conditions and stipulations in the policy." 2 May, Insurance (4th ed.) §361; *Michigan Mut. Life Ins. Co. v. Custer* (1891), 128 Ind. 25, 29, 27 N. E. 124; *Majestic Life, etc., Co. v. Tuttle* (1915), 58 Ind. App. 98, 108, 107 N. E. 22; *National Masonic, etc., Assn. v. McBride* (1904), 162 Ind. 379, 381, 70 N. E. 483; *Farmers Mut. Fire Ins. Co. v. Jackman* (1905), 35 Ind. App. 1, 17, 73 N. E. 730; *German Fire Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 395, 64 N. E. 921, 66 N. E. 1003; *German Mut. Ins. Co. v. Niewedde* (1894), 11 Ind. App. 624, 39 N. E. 534. It is well settled that "where one party has by his representations or

3. conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert he will not, in a court of justice, be

permitted to avail himself of that advantage," and where an insurance company, by its course of dealings with the insured and others known to the insured, has induced a belief that so much of the contract as provides for a forfeiture in a certain event, will not be insisted on, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief. 2 May, Insurance (4th ed.) §361; *Sweetser v. Odd Fellows, etc., Assn.* (1889), 117 Ind. 97, 100, 19 N. E. 722; *Tripp & Bailey v. Insurance Co.* (1882), 55 Vt. 100, 108; *Home Protection, etc. v. Avery* (1888), 85 Ala. 348, 351, 5 South. 143, 7 Am. St. 54; *Supreme Tribe, etc. v. Hall* (1900), 24 Ind. App. 316, 324, 56 N. E. 780, 79 Am. St. 262; *Helm v. Philadelphia Life Ins. Co.* (1869), 61 Pa. St. 107, 100 Am. Dec. 621; *Union Cent. Life Ins. Co. v. Pottker* (1878), 33 Ohio St. 459, 462, 31 Am. Rep. 555; *Painter v. Industrial Life Assn.* (1892), 131 Ind. 68, 71, 30 N. E. 876; *Phoenix Mut. Life Ins. Co. v. Hinesley* (1881), 75 Ind. 1, 10; *Rutherford v. Prudential Ins. Co.* (1905), 34 Ind. App. 531, 539, 540, 73 N. E. 202, and cases cited; *Templer v. Muncie Lodge, etc.* (1912), 50 Ind. App. 324, 333, 97 N. E. 546; *Workingmen's, etc., Assn. v. Leverton* (1912), 178 Ind. 151, 153, 98 N. E. 871, and cases cited.

As applicable to the facts of the instant case, we quote from Bowers, Waiver §308: "In determining whether a waiver has occurred, the test is whether an insurer, by his course of dealing

4. with assured, or by the acts or declarations of his authorized agents, has produced in the mind of the assured an honest belief that the terms and conditions of the policy declaring a forfeiture in the event of nonpayment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent

day or in a different manner; and where there is such belief, and the assured has acted upon it, the insurer will be estopped from insisting upon a forfeiture. So, the issue of a certificate after an assessment is in default is a waiver of the right to a forfeiture for its nonpayment. An acceptance of a past-due payment is, of course, a waiver of any breach of condition as to payment known by the insurer at the time, although such acceptance is not a waiver where the breach is unknown to the insurer at the time." The cases above cited and quoted from abundantly support the conclusion that, if *appellee* by any express agreement with appellant, or by any agreement implied from its acts and conduct led appellant honestly to believe that it, *appellee*, would receive from appellant the monthly premiums on his policy after the day fixed in the policy for the payment of such premiums, and thereby keep his policy alive at all times and for all purposes, *appellee* will thereby be estopped from asserting a forfeiture on account of a delay in payment of such premiums, providing, of course, that such delay was induced by such agreement and the premiums paid and received in accord therewith. It is also certain that the evidence herein set out was such as to have warranted a jury in finding that there was an agreement between Hyslop and appellant which justified the latter in believing that he might pay his premiums any time between the first and the tenth of each month and thereby keep his policy alive at all times and for all purposes; that pursuant to such agreement appellant, for almost two years before his injury, so paid his premiums, and *appellee through Hyslop* delivered to him proper renewal receipts therefor, showing that such policy was continued and kept alive during such period.

Indeed, we do not understand that appellee is disputing the legal proposition above announced, or that the effect of the evidence is as above indicated; but it is insisting that *it can not be*

5. *estopped by the agreement or conduct of Hyslop.*

This brings us to a consideration of the question of Hyslop's authority as agent of appellee and whether his agreement and acts would estop appellee from insisting on the forfeiture here asserted. An insurance company necessarily acts through its agents and a general rule of agency, expressed in many of the decided cases, charges the principal with any act or contract of the agent within the general scope of his *apparent* authority. *Buchanan v. Cain* (1914), 57 Ind. App. 274, 106 N. E. 885, and cases cited; *Farmers Mut. Fire Ins. Co. v. Jackman*, *supra*; *Commercial Union, etc., Co. v. State, ex rel.* (1888), 113 Ind. 331, 15 N. E. 518; *Kerlin v. National Accident Assn.* (1893), 8 Ind. App. 628, 35 N. E. 39, 36 N. E. 156; *Phoenix Mut. Life Ins. Co. v. Hinesley*, *supra*; *Public Sav. Ins. Co. v. Manning* (1915), *ante* 239, 111 N. E. 945, and cases cited. In applying the rule just announced, it has been held in this State, and in other jurisdictions, that an agent of an insurance company having ostensible general authority to solicit applications and make contracts of insurance and to receive first premiums binds his principal by any acts or contracts within the general scope of his *apparent* authority and that, in such a case, the agent is presumed to have the power of the company to waive immediate payment of premiums and make contracts for credit and thereby bind his company; also that an insurance agent authorized to accept payment of premiums, and issue renewal receipts may waive the payment of premiums in cash, notwithstanding a stipula-

tion in the policy to the contrary. *Painter v. Industrial Life Assn.* (1892), 131 Ind. 68, 73, 76, 30 N. E. 876; *Western Assurance Co. v. McAlpine* (1899), 23 Ind. App. 220, 227, 55 N. E. 119, 77 Am. St. 423; *Phoenix Mut. Life Ins. Co. v. Hinesley*, *supra*; *Aetna Life Ins. Co. v. Fallow* (1903), 110 Tenn. 720, 77 S. W. 937, 940, and cases cited; *Globe Mut. Life Ins. Co. v. Wolff* (1877), 95 U. S. 326, 24 L. Ed. 387; *United States Life Ins. Co. v. Lesser* (1899), 126 Ala. 568, 28 South. 646; *American Credit, etc., Co. v. Hecht & Co.* (1910), 137 Ky. 261, 125 S. W. 697, 129 S. W. 340; *Walsh v. Aetna Life Ins. Co.* (1870), 30 Iowa 133, 6 Am. Rep. 664; *Commercial Union, etc., Co. v. State, ex rel.*, *supra*; 1 May, Insurance (4th ed.) §134; Bliss, Insurance (2d ed.) §300. *Stewart v. Union Mut. Life Ins. Co.* (1898), 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147. From the application of the general rule of agency, first above announced, to the respective facts of each of the decided cases cited and quoted from above, it would seem to follow, by an analogy of reasoning, that where an agent of an insurance company, as in the present case, has the power to accept monthly premiums and issue renewal receipts, thereby in effect, extending or renewing the policy of insurance for the period covered by the renewal receipt, such power necessarily implies and carries with it authority on the part of such agent to extend the time of the payment of such renewal premiums. *Aetna Life Ins. Co. v. Fallow*, *supra*; *Dromgold v. Royal Neighbors, etc.* (1913), 261 Ill. 60, 103 N. E. 584.

Appellee insists, however, that by the express terms of his policy, appellant was advised, and therefore agreed, that no agent had authority to

6. change such policy, or waive any of its provisions. This provision is not essentially

different from that found in the policies considered by our courts in many of the decided cases in which it has been held that such a provision may itself be waived, and that such waiver may be effected by an agent of the company, acting within his actual or *apparent* authority. *German-American Ins. Co. v. Yeagley* (1904), 163 Ind. 651, 656, 71 N. E. 897, 2 Ann. Cas. 275; *United States, etc., Ins. Co. v. Clark* (1908), 41 Ind. App. 345, 358, 83 N. E. 760; *Farmers Mut. Fire Ins. Co. v. Jackman, supra*; *Public Sav. Ins. Co. v. Manning, supra*; *Dromgold v. Royal Neighbors, etc., supra*; Analogous cases are those which hold that where the policy provides that any waiver of its provisions must be indorsed on the policy, such provision may itself be waived, either by express agreement, or conduct of the company. *Metropolitan Life Ins. Co. v. Johnson* (1912), 49 Ind. App. 233, 244, 94 N. E. 785; *Hanover Fire Ins. Co. v. Dole* (1898), 20 Ind. App. 333, 338, 339, 50 N. E. 772; *Union, etc., Ins. Co. v. Whetzel* (1902), 29 Ind. App. 658, 665, 661, 65 N. E. 15; *Public Sav. Ins. Co. v. Manning, supra*. It has been decided several times in this State and in other jurisdictions

7. as well, in effect, that the knowledge of an insurance agent acquired while acting for his company in connection with a matter in which he is authorized to act, will be imputed to his principal. *Metropolitan Life Ins. Co. v. Johnson, supra*; *Metropolitan Life Ins. Co. v. Willis* (1906), 37 Ind. App. 48, 76 N. E. 560; *Commercial Life Ins. Co. v. McGinnis* (1912), 50 Ind. App. 630, 97 N. E. 1018; *Supreme Court of Honor v. Sullivan* (1901), 26 Ind. App. 60, 62, 59 N. E. 37. Upon this subject, the case of *Hodson v. Guardian Life Ins. Co.* (1867), 97 Mass. 144, 93 Am. Dec. 73, says: "Although an agent of the company had

no authority to bind them by receiving payment of a premium note after it was due, the company might receive such payment at any time. If they received the amount of the note from their agent after it was due, they were bound to inform themselves of the time when it had been paid to him; and by receiving it from him without inquiry they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy." Again in the case of

Globe Mutual Life Ins. Co. v. Wolff, supra,

7. in speaking of an agent chargeable with the collection of premiums on policies, the court said: "It will be presumed that he (such agent) informs the company of any circumstances coming to his knowledge affecting its liability."

Appellee insists that the latter case stands alone and is out of harmony with the great weight of authority. It may be true that the language there used is broader than that found in any of the other cases, in that it imputes to the company *any knowledge affecting its liability generally* which may have come to its agent while such agent is acting in the scope of his authority even though the circumstance which brought to the agent such knowledge, or the knowledge itself, had no relation to, connection with or affect on the particular thing which the agent was authorized to do. When the language quoted is construed in the light of what precedes and follows it, and in the light of the facts of the particular case being considered by the court, it will be seen that the court intended to be understood as saying, that an agent of an insurance company, while acting for such company, in a matter in which he is required or authorized to act, will be presumed to inform his company of "any circumstances coming to his knowledge", in any

way affecting and necessarily incident to, the matter in which such agent was so required or authorized to act, and affecting the liability of the company, and hence is in harmony with the other cases and is sufficiently broad to include and cover the facts of the instant case.

There is no contention made by appellee that Hyslop did not have authority to collect the monthly premiums and deliver the renewal receipts therefor as dated and countersigned by him, or that he did not make the agreement testified to by appellant, or that he did not receive appellant's monthly premiums between the first and the tenth of each respective month for a period of almost two years. It is also conceded, in effect, that during this period Hyslop as a part of his duties was required to *make and did make to appellee a monthly report of the premiums so collected by him*. It certainly can not be contended that the time of payment of such premiums was not a fact or circumstance connected with Hyslop's duty of collecting them, and in view of the provisions of the policy above set out, it was a fact and circumstance which both Hyslop and appellee necessarily knew affected appellee's liability, and hence under the authorities, *supra*, Hyslop's knowledge was appellee's knowledge. If appellee did not know that its agent had been receiving these premiums after the first of the month, and the arrangements under which they were received, the fault was not that of appellant but was its own or that of its agent to whom it had given authority to collect premiums and deliver the renewal receipts therefor, properly countersigned and dated, and from whom it required a monthly report, etc. Moreover it should be stated in this connection that the italicized portions of the letters, *supra*, of appellee and its

agent Hyslop to appellant warrant the inference that Hyslop in his monthly reports gave appellee full information as to the date of receiving the premiums reported. In its letter of July 22 to appellant, appellee says, that it had "ascertained from Mr. Hyslop, the collector" that the July premium was not paid until the tenth. How did it get this information? The italicized portion of Hyslop's letter of July 23, *supra*, answers this question. In this letter Hyslop says that appellee had said to him in its letter of a *few days* before that "*it hadn't received my July report as to whether you (appellant) had paid your July premium.*" "*I wrote them giving dates when your remittance was received, which of course appeared on report as well.*" This reference to appellee's letter and the words, "of course" as here used are significant. They make Hyslop's letter, at least, open to the interpretation that it was well understood by him and appellant that his reports were not made until after the first of the month and that when made they should show, and had, in fact, always before shown, the date when the premiums reported were paid; that he, Hyslop, took it for granted that appellant should also, *as a matter of course*, understand that his reports would show such fact. Having received the continued benefits of an arrangement made by its own agent in connection with the duty imposed on him, appellee is in no position now to relieve itself from the corresponding obligation incurred by such arrangement, the effect of which was to estop it from insisting on the forfeiture of the policy now claimed and asserted. The evidence was sufficient to warrant the inference that appellee knew or should have known of the arrangement between Hyslop

and appellant under which appellant's monthly premiums had been received and renewal receipts issued therefor for a period of almost two years; that if appellee did not know of such arrangement that it at least knew enough to put it on inquiry and hence should be charged with the knowledge which such inquiry would have elicited. Hyslop received appellant's last premium between July 8 and July 10, just as he had been receiving such premium for almost two years past, without question or inquiry as to appellant's condition or the reason for his delay in paying it, and just as Hyslop's past conduct had led appellant to believe he would receive it. The fact that the payment was made after appellant was injured can have no influence

8. on appellant's right to make it under his arrangement with Hyslop, especially in the absence of any evidence of collusion or fraud between appellant and Hyslop, and in the absence of any evidence to show that appellant had in fact before his injury made up his mind not to pay such premium, and permit a forfeiture of his policy as a result of such nonpayment.

It is further contended by appellee, that even though appellant had the agreement with Hyslop which he asserts and that appellee knew he was receiving appellant's premiums after they

9. were due, that in any event, such agreement must be read in the light of the provisions of the contract of insurance, and that paragraph "W" of the policy, above set out, expressly provides and fixes appellant's rights under his policy in case of delayed payments of premiums; that the premium receipts likewise show on their face that the respective premiums for which they were given were accepted by the company "*subject to the condition of the policy.*"

This contention of appellee is predicated on its affirmative answer which sets up said clause "W" of the policy and alleges that payments of premiums were made thereunder; that appellant was injured on July 8, 1912, at a time when he had no insurance under the policy; that appellee as soon as it had knowledge of the facts tendered back to appellant the premium of \$2.60 so paid by him in July to appellee's agent on July 13, 1912, which sum so tendered by appellee was refused by appellant; that under the terms of the policy it was expressly agreed that no agent had any power or authority to change or alter the terms or time of payment of premiums and no agent had such power.

The question of the sufficiency of this answer is not presented. Assuming, without deciding that it states a good defense to appellant's complaint, the evidence upon the issue so presented is not undisputed. Appellant's statement of the arrangement made with Hyslop under which his premiums were paid and the extension agreed upon between him and Hyslop by which the time of payment was extended were inconsistent with a total or partial suspension of liability on the policy. It follows that the question whether appellant's premiums were received under clause "W" of the policy and his insurance continued thereunder was a question of fact under the evidence to be determined by the jury under proper instructions, and hence the peremptory instruction was in any event improper.

Appellee has filed a cross-assignment of error challenging the ruling of the trial court on its demurrer to each of the paragraphs of complaint. In our disposition of the questions raised by the peremptory instruction, we have in effect disposed of appellee's several objections to each of said

paragraphs, and an examination of their averments, above set out, and the decisions herein referred to and cited, will disclose that no error resulted from the ruling on such demurrers. It follows that on account of the error of the trial court in giving the peremptory instruction in favor of appellee the motion for new trial should have been granted.

The judgment below is therefore reversed with instructions to grant appellant's motion for a new trial, and such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 112 N. E. 115. As to imputation of knowledge of agent to insurer so as to effect waiver, see 107 Am. St. 99. As to the effect of limitations on an agent's authority to waive conditions in insurance policy, see 2 Ann. Cas. 112; 9 Ann. Cas. 380. As to who is agent of insurance company so as to make his knowledge imputable to the company, see Ann. Cas. 1913 A 849. As to waiver of provision in life insurance policy as to time of payment of premium by acceptance of premium after appointed time, or similar act, see 7 Ann. Cas. 385.

JONES v. CHANDLER ET AL.

[No. 8,989. Filed November 23, 1915. Rehearing denied April 4, 1916.]

1. *WILLS.—Construction.—Intention of Testator.*—Where the language of a will is free from doubt, it needs no construction; but where there is doubt, the intention of the testator, as gathered from the entire will aided by the rules of law applicable to the construction of wills, must be given effect. p. 504.
2. *WILLS.—Construction.—Vesting of Estates.*—In case of doubt as to the intention of the testator, the estate will be deemed to have vested. p. 504.
3. *WILLS.—Construction.—Remainders.—Vested or Contingent.*—Whether an estate is vested or contingent is determined by the right and capacity of the remaindermen to take possession of the estate, if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainderman. p. 505.
4. *WILLS.—Construction.—Postponement of Estates.*—The postponement of estates is looked upon with disfavor, and the intent

to do so must be clear and not arise from inference or construction. p. 505.

5. *WILLS.—Construction.—Vesting of Estates.—Remainders.—“Postponement of Estates.”*—There is a distinction between the vesting of an estate and the enjoyment of a remainder, and words postponing an estate are presumed to relate to the beginning of the enjoyment and not to the vesting of such an estate, and the vesting of a remainder absolutely is preferred rather than the vesting contingently or conditionally. p. 506.
6. *WILLS.—Construction.—Remainder.*—Under a will devising land to the daughter of testatrix “to be held, possessed and enjoyed by her during her natural life and at her death to descend to her children, such as may be living”, the testatrix intended to make a final disposition of her property, that the daughter should have a life estate, and that her grandchildren should be vested with such an estate as would descend to their heirs upon their death. p. 507.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Oliver S. Jones against Pearl Chandler and others. From the judgment rendered, the plaintiff appeals. *Affirmed.*

O. B. Ratcliff, for appellant.

V. E. Livengood and *F. E. Livengood*, for appellees.

MORAN, J.—Appellant sought to quiet the title to 114 acres of land in Warren County, Indiana, as against appellees and others, who were made defendants to a complaint in the statutory form. Issues being joined by an answer of general denial, the cause was submitted to the court on an agreed statement of facts, upon which the court found that appellant and appellee, Augustus Coke Cronkhite, were the owners each in fee simple of an undivided one-third part of the real estate in question, and that appellees, Pearl Chandler, Bertha R. Cronkhite, and Mary C. Williams, were the owners each in fee simple of an undivided one-ninth part thereof. Judgment was rendered accordingly. Appellant appeals upon the ground that the court

erred in not finding that he was the owner in fee simple of the entire 114 acres of real estate described in his complaint, and this error he predicates on the overruling of his motion for a new trial.

The agreed statement of facts discloses that Joseph Shelby died testate at Fountain County, Indiana, in 1846, and in December of the same year, his last will and testament was probated. By the provisions of his will, the real estate, to which appellant seeks to quiet the title, was devised to testator's widow, Sarah Shelby, so long as she should continue unmarried, and upon her marriage, the real estate was to be divided among his widow and five children. Sarah Shelby remained unmarried, and in addition to the title acquired by the will of her deceased husband, she obtained all the interest claimed in the real estate by the other devisees by mesne conveyances and by will from one of the devisees, who died testate shortly after the death of his father. Sarah Shelby died testate at Fountain County, Indiana, in 1860, and in December of that year, her last will and testament was duly probated. At the time of her death, she was the owner in fee simple of the 114 acres of real estate above mentioned. That part of the last will of Sarah Shelby necessary to an understanding of the point involved reads as follows:

"I will and bequeath to my daughter, Emily Jones, to be held, possessed and enjoyed by her during her natural life, and at her death to descend to her children, such as may be living, the following described land, to-wit: (Description of 114 acres of real estate)."

At the date of the execution of the will, Emily Jones had two children, Sarah B. Jones and Oscar N. Jones. Her other child, appellant, Oliver S.

Jones, was born October 24, 1862. Oscar N. Jones intermarried with Mary C. Cronkhite, and died intestate May 12, 1890, and left surviving his widow, who is now Mary C. Williams, one of appellees herein, and two children, appellees, Pearl Chandler and Bertha R. Cronkhite. Sarah B. Jones intermarried with Augustus Cronkhite and died December 1, 1902, leaving surviving her husband and one child, appellee, Augustus Coke Cronkhite; the husband thereafter conveying his interest in the real estate left by his deceased wife to appellee, Augustus Coke Cronkhite.

A solution of the question presented for review requires a construction of the last will and testament of Sarah Shelby. It will be observed that at the time of the death of Emily Jones, she was survived by one child, appellant Oliver S. Jones, her three grandchildren, the husband of her daughter Sarah B. Cronkhite, and the wife of her son, Oscar N. Jones; her other children having predeceased her. It is maintained by appellant that on the death of Sarah Shelby, the children of Emily Jones took a contingent estate in remainder, and that upon the birth of appellant, Oliver S. Jones, before the termination of the life estate, the estate opened up to let him in with the other children; and upon the death of Sarah B. Cronkhite and Oscar N. Jones, they were divested of their estate in remainder on their failure to survive the life tenant, and that appellant's estate was enlarged by their deaths, so that on the death of the life tenant, he became the owner of an absolute estate in fee simple of the real estate in question. It is the contention of appellees that, upon the death of Sarah Shelby, Emily Jones took a life estate and her children, then living, took a vested remainder in fee, subject to a diminution of their shares to let in appellant,

light is furnished by the general rules of

5. law applicable to the construction of the will under consideration which are: The postponing of estates is looked upon with disfavor; the intent so to do must be clear and not arise from inference or construction; that there is a distinction between the vesting of an estate and the enjoyment of a remainder; and words postponing an estate are presumed to relate to the beginning of the enjoyment and not to the vesting of such an estate; and that the vesting of a remainder absolutely is preferred rather than the vesting contingently or conditionally, partial intestacy being avoided, if possible. *Aspy v. Lewis* (1899), 152 Ind. 493, 52 N. E. 756; *Alsman v. Walters* (1916), 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; *Myers v. Carney* (1908), 171 Ind. 379, 84 N. E. 400; *Clore v. Smith, supra*; *Taylor v. Stephens* (1905), 165 Ind. 200; 74 N. E. 980; *Campbell v. Bradford* (1906), 166 Ind. 451, 77 N. E. 849; *Harris v. Carpenter* (1887), 109 Ind. 540, 10 N. E. 422; *Moore v. Hare* (1896), 144 Ind. 573, 43 N. E. 870. In *Aspy v. Lewis, supra*, the testator devised to his wife all his real estate, so long as she remained his widow, and the full possession thereof to his only daughter at the death or marriage of his widow, providing the daughter should be living, and if not, to go to his brothers and sisters. The widow never remarried, the daughter married and died before her mother, leaving children. It was held that the daughter took a fee, which vested absolutely on the testator's death, and which descended to her heirs. Numerous cases might be cited in support of this principle.

If appellant's contention is correct, that upon the death of his brother and sister, notwithstanding

they left issue, he became vested with the 6. interest they had in the real estate in question during their lifetime, then this same line of reasoning would divest appellant of a transmissible estate, had he died subsequent to the death of his brother and sister and prior to the life tenant. This condition would bring about partial intestacy. If we adopt appellant's construction of the will, then Sarah Shelby in fact devised but a life estate in her real estate, and this runs counter to the rule of construction that partial intestacy is not favored by the courts in the construction of wills. An examination of the entire will discloses that the testatrix intended to make a final disposition of her property, and that in so doing, she intended her daughter to have a life estate, and her grandchildren to be vested with such an estate as would descend to their heirs upon their death.

In the light of the facts and the foregoing authorities, we have reached the conclusion that, upon the death of Sarah Shelby, the fee simple title to the 114 acres of real estate described in the complaint vested in Oscar N. and Sarah B. Jones, subject to diminution to let in appellant, an after-born child, and upon the death of Oscar N. and Sarah B. Jones, their interests passed to their heirs, the appellees herein, as tenants in common with appellant.

The court did not err in overruling appellant's motion for a new trial. Judgment affirmed.

NOTE.—Reported in 110 N. E. 235. As to reversions and remainders, see 32 Am. St. 778; 113 Am. St. 55. As to sufficiency of provision as to after-born child to prevent revocation of will, see 43 L. R. A. (N. S.) 1195. As to admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting after-born child, see 13 L. R. A. (N. S.) 781.

LAUFER v. LAUFER.

[No. 9,043. Filed April 4, 1916.]

1. **APPEAL.**—*Review.*—*Ruling on Demurrer.*—*Failure to File Memorandum of Defects.*—The failure to file a memorandum of defects with the demurrer to a complaint, does not of itself operate to make the ruling of the trial court in sustaining such demurrer erroneous, since on appeal the court may look beyond a memorandum in order to uphold the sustaining of a demurrer. p. 510.
2. **DIVORCE.**—*Alimony.*—*Security.*—*Statutes.*—Under §1088 Burns 1914, §1047 R. S. 1881, providing that the court in its discretion may allow alimony to be paid by installments on sufficient security being given, and that if the surety required be not given within thirty days the whole amount of alimony shall be due, plaintiff in a divorce case could not avoid execution against him for alimony under a decree providing for payment by installments, on the theory that the installments were not due and that pursuant to an agreement no surety was required, since the alleged agreement did not appear from the decree, and though the decree was silent as to the requirement of surety the provisions of the statute were to be read into it. p. 510.
3. **HUSBAND AND WIFE.**—*Dissolution of Marriage.*—*Agreements.*—*Validity.*—Husband and wife are not free to enter into agreements that tend to promote or facilitate the dissolution of marriage, since the State and society have such an interest that the law steps in and holds them to various obligations and liabilities. p. 513.

From Hancock Circuit Court; *Earl Sample*,
Judge.

Action by John Laufer against Matilda Laufer.
From a judgment for defendant, the plaintiff
appeals. *Affirmed.*

Tindall & Tindall, for appellant.

R. Williamson and Robert L. Mason, for appellee.

MORAN, J.—This was a proceeding to set aside and quash an execution. The same was determined in the court below by the sustaining of the demurrer to a pleading styled a motion or complaint. Appellant abided the ruling against him, refused to plead further, and from a judgment that he

take nothing by his pleading and that appellee recover costs, an appeal has been taken.

As to whether the court erred in sustaining the demurrer to the pleading is to be determined from the facts pleaded, which, in substance, are that on April 3, 1913, the necessary steps having theretofore been taken, appellee Matilda Laufer was granted a decree of divorce from appellant John Laufer with alimony in the sum of \$4,000, to be paid \$1,000 in 6, 18, 36 and 48 months respectively from the date of the granting of the decree. It was agreed between the parties and counsel representing them respectively that the alimony should be in said sum, and that the payment thereof should be in the manner stated; that appellant was the owner of seventy-three acres of unincumbered land in Hancock County, Indiana, at the time of the value of \$9,000, and that in consideration of the amount of the alimony and by reason of it being a first lien upon appellant's land, the payments were arranged in the manner as aforesaid, and without interest until after maturity, and that appellant should not be required to give any security for any of the installments, the same being waived by appellee; that the decree was drafted in harmony with the agreement and appellant relied upon the same and paid the costs of the action and the first installment of alimony, but on October 18, 1913, appellee wrongfully caused the clerk of the Hancock Circuit Court to issue an execution and place the same in the hands of the sheriff by which all of the installments of alimony other than the first were attempted to be collected; that a copy of the execution was made a part of the pleading, and, on October 20, 1913, the sheriff served the execution upon appellant, and was threatening to levy upon his goods and chattels;

that appellant was not in default under the terms of the agreement; and the execution should be quashed and set aside, and the sheriff be ordered and directed not to serve and levy the same.

Before taking up the main question, we will first dispose of appellant's contention that the failure of appellee to file a memorandum with

1. her demurrer to appellant's complaint or motion, pointing out the infirmities of the pleading, precluded the court from passing upon the sufficiency thereof, and in sustaining the demurrer thereto, under such circumstances, error was committed. Appellee's contention in this behalf is not well taken. The mere fact of sustaining a demurrer to a pleading in the absence of a memorandum being filed with a demurrer is not of itself sufficient to predicate error thereon, as it has been held that this court may look beyond the grounds stated in such memorandum to uphold the ruling of the trial court in its action, but will not look beyond the grounds stated in the memorandum to overthrow the ruling of the trial court. *Boes v. Grand Rapids, etc., R. Co.* (1915), 59 Ind. App. 271, 108 N. E. 174, 109 N. E. 411; *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471.

The statute, §1088 Burns 1914, §1047 R. S. 1881, in reference to the granting of alimony provides that, "The decree for alimony to the

2. wife shall be for a sum in gross, and not for annual payments; but the court, in its discretion, may give a reasonable time for the payment thereof, by installments, on sufficient surety being given. And in all cases where alimony has been thus given by installments, or may hereafter be given, and the security required shall not be given within thirty days from the date of such

decree, then the whole amount of such alimony shall become due and payable the same as if no such installment had been mentioned in the decree." The exact language of the decree in so far as it is material to the question presented is: "It is therefore considered and adjudged by the court that the plaintiff take nothing by reason of his complaint herein. It is further considered, adjudged and decreed by the court that the bonds of matrimony heretofore and now existing between the plaintiff John Laufer and the defendant Matilda Laufer be, and the same are hereby dissolved and forever held for naught, and that the defendant is hereby divorced from plaintiff upon her cross-complaint. It is further considered and adjudged by the court by agreement of the parties herein that defendant recover of and from plaintiff as alimony the sum of \$4,000, the same to be paid as follows: \$1,000 within 6 months from this date; \$1,000 within 18 months and \$1,000 each year thereafter until paid, or the plaintiff shall have the privilege to pay any part or all of said alimony at any time prior to the date it becomes due."

There are many extraneous facts pleaded as to an agreement being entered into between the parties and their respective counsel as to the amount of the alimony and the payment of the same by installments, and that security therefor was not exacted but waived by appellee. The pleading fails to disclose that the agreement contended for in so far as it relates to the waiving of security became a part of the decree. The value of the pleading must be tested by the decree as entered of record, as the decree is the foundation of the proceedings. The question to be determined is: Could appellee successfully coerce the payment of alimony irrespective of the fact that

the same was made payable by installments, where such were not secured by appellant? In other words, does the section of the statute, *supra*, operate so as to require security for the payment of the installments of alimony, where the decree is silent in this respect?

There is nothing in the decree of divorce itself, as we have seen, from which it can be inferred that the installments were not to be secured, unless it can be said that the failure to so state that they were to be secured and the character and kind of surety required of appellant is equivalent to a finding to this effect. In *Boggs v. Boggs* (1910), 45 Ind. App. 397, 90 N. E. 1040, where objections were raised on appeal that the judgment was defective on account of not stating the character and kind of security nor by whom to be approved, it was held that the objection was not tenable inasmuch as the form of the judgment was not challenged in the court below. And it was further held in this case that the failure of the decree to provide how the bail or stay of execution was to be taken, the character of the surety, and by whom approved, implied that the stay be taken in accordance with §§732, 733 Burns 1914, §§690, 691 R. S. 1881. In this case the decree followed the statute in the particular that it provided that if the judgment was not stayed or secured within thirty days the whole amount became due, but it was there held that the clerk had power to approve the security for the payment of the judgment of alimony, as by the sections above referred to, the clerk of the circuit court is so empowered.

In *Lake Erie, etc. R. Co. v. Huffman* (1912), 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914 C 1272, it was held that good practice required

that the judgment should provide for interest, but on failure to do so, the statute providing that judgments should draw interest would be read into the same. This same principle applies with equal force to the judgment for alimony in the case at bar, as the statute provides that the court may in its discretion allow the alimony to be paid by installments on sufficient surety being given, and if the surety required should not be given within thirty days, the whole amount of alimony should become due. The surety referred to as being required is the surety mentioned in the statute and the failure of the court to specify the character of the same does not prevent the operation of the statute. While, as was said in *Lake Erie, etc., R. Co. v. Huffman, supra*, the better practice required that the judgment provide for interest, the same is true in the case at bar; the better practice would require that the judgment for alimony be amplified in conformance with the statute when time was given for its payment, but its failure in this respect does not prevent the statute being read into the judgment.

It is also contended by appellee that the provisions of the statute in relation to alimony and the time of the payment of the same can

3. not be waived by the parties, and further that in order to litigate the question sought to be presented by this proceeding, the sheriff was a necessary party defendant. As to the dissolution of marriage itself, the parties are not free to enter into agreements that tend to promote or facilitate the same (9 R. C. L. 256), as the State and society have such an interest in the institution of marriage that the law steps in and holds the parties to various obligations and

liabilities. As to whether the provisions of the statute requiring installments of alimony, when time is given for the payment to be secured, falls within this general principle as tending to promote or facilitate a dissolution, so that the same can not be waived by the parties, and as to whether the sheriff of Hancock County was a necessary party defendant to the proceedings, we need not decide, in view of the conclusions we have reached.

The record discloses no error calling for a reversal of the judgment. Judgment affirmed.

NOTE.—Reported in 112 N. E. 106. As to validity of separation agreements between husband and wife, see Ann. Cas. 1913 D 265.

GRIM v. JOHNS ET AL.

[No. 9,289. Filed April 5, 1916.]

1. ADVERSE POSSESSION.—*Defeating Acquired Title.*—Where one had acquired title by adverse possession to a strip between the platted line of his lot and a fence, his subsequent expression of satisfaction with a survey made by the adjoining owner showing that the fence was beyond the original lot line, and his statement that they would move the fence, did not defeat his title or operate as a conveyance of the strip. p. 518.
2. ADVERSE POSSESSION.—*Defeating Acquired Title.—Estoppel.*—Where one had acquired title by adverse possession to a strip between the platted line of his lot and a fence, his subsequent agreement to move the fence to the original lot line, not having been acted on, and no money having been expended on the faith of it, did not estop him from claiming the strip. p. 519.

From Huntington Circuit Court; Samuel E. Cook, Judge.

Action by Samuel H. Grim against Eva A. Johns and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

C. K. Lucas, for appellant.

Fred H. Bowers and Milo N. Feightner, for appellees.

CALDWELL, J.—Appellant brought this action to quiet his title to certain real estate alleged to be owned by him, situate in the town of Roanoke, Huntington County. From a judgment in favor of appellees, he prosecutes this appeal. The sufficiency of the evidence to sustain the decision is the only question presented and discussed. The real estate to which appellant seeks to quiet his title is designated in the complaint as lot No. 13 in Horton's Addition. The division lines of the lots in that addition do not run according to the cardinal points, but angle eastward, running north and northward running west, etc. On the southwest line of the lot, there is a public street. In the first paragraph of the complaint, the southeast and the northwest lines are described as extending northward along the respective lines of the lot a distance of 4.63 and 4.645 chains respectively from the southeast and southwest corners respectively. The evidence establishes that as platted lot 13 and lot 12 west of it and lot 14 east of it, each extended a distance of 4.50 chains northward from the street. Appellant is the owner of the record title to lot 13, and appellee, Eva A. Johns, is the owner of the record title to lot 16, which abuts on the northeast line of lots 12, 13, 14 and 15. The ground in controversy in this action is the strip included in the description set out in the complaint, but not included within the platted dimensions of lot 13. This strip lies along the northeast side of lot 13 as platted, and is .145 chains wide at one end, and .13 chains wide at the other end. The evidence is conclusive that prior to 1898, title to the real estate as described in the first paragraph of the complaint including the strip in controversy had ripened in appellant by the adverse holding of himself and his predeces-

sors. This fact is not contested by appellees in the brief filed in their behalf, but it is their contention that in said year a line other than as claimed by appellant was established by agreement. The facts are as follows: In 1898, the record title to lot 16 was in Zent; that to lot 13 was in Webster. For more than forty years prior thereto, a fence extended on and along the northeast line of the strip of ground above described, the circumstances being such that this fence marks the line between the two parcels of land as established by adverse holding. There was no evidence that at any time prior to said year any one questioned the line as indicated by the fence. In that year, the town authorities employed Ruggles the county surveyor to make a resurvey of certain portions of the town site. There was evidence that at the time when such resurvey was being made, Zent, feeling some uncertainty respecting the lines and corners of lot 16, employed Ruggles to survey the lot, and informed Webster of the fact. Ruggles thereupon surveyed the lot, establishing its corners and running its lines, using as his guide the recorded plat of a previous survey. Webster, at the invitation of Zent or Ruggles was present and served as a chainman. According to the Ruggles survey, the line extending from the southwest corner to the southeast corner of lot 16, and marking the boundary between lots 13 and 16 followed the southwest line of said strip thus indicating that such strip was a part of lot 16 as platted. There was evidence that when Webster saw the result of the survey, he expressed himself as satisfied therewith, and that he said to Zent: "We will move the fence over now if you want to," to which Zent replied: "We will just let it go until the fence needs repairing,

and then we will put it on the line." The parties took no steps to move the fence, and continued to occupy their respective tracts up to the old fence until May 16, 1900, when Zent conveyed lot 16 to Bridge by the record description. By the decease of the latter, the lot descended to his widow, who afterwards intermarried with Jacob Johns, and who is the appellee Eva A. Johns. February 9, 1903, Webster conveyed lot 13 to appellant, describing it as lot 13 in Horton's Addition. At that time the old fence constituted the apparent boundary between the two tracts, and there was no evidence that Grim prior to such time had any knowledge to the contrary or of the Ruggles survey and the lines run thereby, or of any understanding existing between Zent and Webster. Zent, after he had conveyed lot 16, and after lot 13 had been conveyed to appellant, informed the latter that the surveyed line ran south of the old fence, to which Grim made no response. This action was commenced in June, 1913. Shortly before that time, appellee, with knowledge that appellant claimed that the old fence was the line, agitated the question of the removal of the fence to the surveyed line. After some controversy, appellant agreed that the fence might be moved, which appellees commenced to do the next morning, whereupon appellant ordered them to desist, and on their failure to do so, commenced this action.

At the time of the Ruggles survey, Webster was in possession of the entire tract situated south of the old fence. He held and claimed to own it as lot 13. Zent had asserted no title to any part of it. Webster understood that he owned only lot 13, but he believed that that lot extended as far north as the fence, and that it included the

strip in dispute here. Subsequently he negotiated with appellant for the sale of the lot, and in company with him inspected it, without informing him that the line was otherwise than as indicated by the position of the fence, or that there was any arrangement for the removal of the fence. Thereupon, pursuant to such negotiations, Webster conveyed the tract to appellant, describing it as lot 13, and under such description he yielded and appellant took possession of and thereafter claimed to own the entire tract. So matters stood for another period of ten years. As we have said, the fact that Webster's title to the tract up to the fence had ripened into a fee by

1. an adverse holding is not controverted.

Webster then, at the time of the survey, owned the strip in fee, by reason of such adverse holding. Appellees, while apparently conceding this fact at least by implication, take the position that title to the strip passed to Zent by virtue of the Ruggles survey, and the statements made by Webster respecting the result of that survey. It should be kept in mind that we are not confronted here with a situation wherein the location of a line dividing the estates of two proprietors is in doubt or dispute. The location of the old fence was ascertained. If at one time it did not mark the true line, it had become such by adverse possession. The Ruggles survey if correct ascertained the true platted north line of lot 13, but it did not determine the line dividing Webster's land from Zent's. Under the circumstances, Webster's statement or the bare agreement to remove the fence at sometime in the future, did not operate as a conveyance of the strip, the title to which he had acquired by adverse possession. Language used by the Supreme Court in *Rosenmeier v.*

Mahrenholz (1913), 179 Ind. 467, 101 N. E. 721, is applicable here: "As appellee's title up to the line marked by the fence had ripened by adverse possession, his participation in the survey and what he said at that time did not defeat that title. It has been held that, neither payment of rent nor a survey unappealed from will defeat a title previously perfected by adverse possession for more than 20 years, nor revive the right of the original owner. (Authorities). And this is the rule whether the holder of the title by prescription procures the official survey to be made or merely consents to it at the instance of his opponent. (Authorities). In *Rennert v. Shirk* (1904), 163 Ind. 542, 72 N. E. 546, it was held that when title has been acquired by 20 years' adverse possession, such title is not affected by a subsequent statement of a claimant that he did not claim the real estate in dispute."

There is presented here no question of estoppel that may operate in favor of appellees. The agreement to move the fence was not acted upon; no money was expended on the faith of it;

2. appellees do not claim that they or their predecessors in title took a conveyance of lot 16 from Zent with the understanding that the line was otherwise than as indicated by the old fence or that they had any knowledge of the agreement between Webster and Zent. They introduce no evidence to that end. Title having passed from Zent, his successors remained passive for thirteen years before taking any steps to move the fence. If the facts here arouse the principle of equitable estoppel, it should be applied in favor of appellant, rather than appellees. In our judgment, the evidence does not sustain the decision. *Rosenmeier v. Mahrenholz*, *supra*; *Cleveland v. Obenchain* (1886), 107 Ind. 591, 8 N. E. 624;

Rennert v. Shirk, *supra*; *Wood v. Kuper* (1898), 150 Ind. 622, 50 N. E. 755; *Fatic v. Myer* (1904), 163 Ind. 401, 72 N. E. 142; *Williams v. Atkinson* (1899), 152 Ind. 98, 52 N. E. 603; *Riggs v. Riley* (1888), 113 Ind. 208, 15 N. E. 253; *Logston v. Dingg* (1904), 32 Ind. App. 158, 69 N. E. 409; *Helton v. Fastnow* (1904), 33 Ind. App. 288, 71 N. E. 230; *Amburgy v. Burt, etc., Lumber Co.* (1905), 121 Ky. 580, 89 S. W. 680; *Washington Rock Co. v. Young* (1905), 110 Am. St. 682, note; *Randleman v. Taylor* (1910), 94 Ark. 511, 127 S. W. 723, 140 Am. St. 141.

The judgment is reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE—Reported in 112 N. E. 13. As to admissibility of evidence of reputed title in action involving adverse possession, see Ann. Cas. 1914 D 243.

MATSON v. MATSON ET AL.

[No. 9,278. Filed April 5, 1916.]

APPEAL.—*Supersedeas*.—*Authority to Grant*.—Where objections to the probate of a will were filed in the office of the circuit clerk, but no notice issued thereon, and the will was later probated in the superior court, followed by the immediate filing of amended objections and notice in the circuit court, as well as a petition in the superior court to set aside the probate, and the probate was thereafter set aside in the superior court, from which judgment the proponent of the will appealed, the court having jurisdiction of such appeal was without authority to grant a writ of *supersedeas* to stay the prosecution in the circuit court of the action in resistance to the will on the ground that such action is being prosecuted without bond as required by statute where objections are made after probate, and that if the action is permitted to go to trial the questions raised by the pending appeal would become moot, since the authority to grant a writ of *supersedeas* is purely statutory and ordinarily can be granted only to stay execution or proceedings in the trial court in the particular case from which the appeal is taken.

From St. Joseph Superior Court; *George Ford*, Judge.

Proceedings in the matter of resisting the probate of the last will of Lavina Almack, deceased. From a judgment setting aside the probate, Harley F. Matson appeals and makes application for a writ of *supersedeas*. *Application denied.*

Isaac Kane Parks and *McInernys, Yeagley & McVicker*, for appellant.

Hamilton & Curtis and *Van Fleet, Hubbel and Dinnen*, for appellees.

HOTTEL, J.—A second application for a writ of *supersedeas* in this case is presented by appellant. The facts shown in the petition on which such application is based and by the record are in substance, as follows: On March 1, 1915, Lavina Almack died testate in St. Joseph County, Indiana. On March 2, 1915, the appellee Frank Matson filed in the office of the clerk of the St. Joseph Circuit Court objections to the probate of the will, but caused no notice to issue on the objections. On March 5, 1915, and before any notice had been issued on the objections the will of the decedent was probated by the superior court of St. Joseph county. After the probating of such will by the superior court, to wit, on March 6, 1915, the other appellees, joining with Frank Matson, filed in the circuit court of the county amended objections to the probate of the will and caused notice to issue thereon, and immediately thereafter filed their petition in the superior court to set aside the probate of the will in that court. There was a trial of the issue presented by such petition and the answers thereto, resulting in a finding and judgment in such superior court setting

aside the probate of the will by such court and from that judgment, this appeal is prosecuted by appellant.

The principal question presented by such appeal, as stated by appellant in his petition herein, is whether appellees had such an action pending in the circuit court at the time of the probating of the will by the superior court as would oust the jurisdiction of the latter court and hence prevent the probating of the will by such court. Appellant's petition further avers that appellees have never filed any bond with the clerk of the circuit court of St. Joseph county in the action to resist the probate of the will pending in that court, and that they are now seeking and threatening to prosecute the action under and upon the statute providing for the filing of objections to the probating of a will before the same is probated; that appellees have now demanded a jury trial of such cause, and the cause has been set for trial; that appellees will be permitted to prosecute the cause in the circuit court and contest the will without bond, as required by statute where the objections to the probate are made after the will has been probated; that if appellees are allowed to proceed with the trial of their objections to the will in the circuit court, appellant's appeal herein will raise only a moot question and be of no avail, and hence will be defeated by the trial in such circuit court; that appellant has a meritorious appeal and, if the judgment herein shall be reversed by this court, the effect thereof will be to prevent appellees from trying their cause in the circuit court without giving bond as required by §3155 Burns 1914. §2597 R. S. 1881. A writ of *supersedeas* staying proceedings in the circuit court is prayed.

The authority on which the appellate tribunal may grant a writ of *supersedeas* is statutory. §§682, 687, 689 Burns 1914, §§641, 645, 648 R. S. 1881. Such writ can be granted ordinarily only for the purpose of staying execution or proceedings in the trial court in the particular case from which the appeal is taken. The appeal from the judgment of the *superior* court of the county alone can not give this court any jurisdiction over the *circuit* court of such county, or over any proceedings therein, and hence any writ of *supersedeas* issued by this court to the latter court on the petition under consideration would be without authority and void, and hence could not be enforced. We do not mean to be understood as saying that the appellate tribunal, upon application and showing properly made therein, has not the inherent authority to stay proceedings in any case where such stay is a necessary incident to the exercise of the jurisdiction of such appellate tribunal or necessary to protect or give effect to its orders or judgment, but the petition herein filed presents no such question.

We do not deem it necessary or proper to enter into any discussion of the effect of a judgment in the circuit court in the action there pending on the question presented by this appeal in case appellees insist upon, and the trial court permits, such case to proceed to trial and judgment before the disposition of the appeal in this case, further than to say it would seem that a way is open to appellant to properly save and present any such question or any question arising out of any act or proceeding in such circuit court which may be prejudicial or harmful to him.

For the reasons indicated, the prayer of the petition is denied.

WESTERN BRASS MANUFACTURING COMPANY
v. HAYNES AUTOMOBILE COMPANY.

[No. 9,003. Filed April 5, 1916.]

1. **APPEAL.**—*Theory of Case.*—*Change on Appeal.*—Where the trial proceeded on the theory of an implied warranty, the court on appeal will not permit appellant to change its position and uphold its contention that a written warranty as to quality alone is involved and controls the rights of the parties. p. 526.
2. **SALES.**—*Breach of Warranty.*—*Sufficiency of Evidence.*—Where there was evidence to show that brass railings sold to be used in the equipment of automobiles were sold on information as to the use that was to be made of them, but that they were of an inferior grade and not substantial, it was sufficient, though in conflict with evidence produced by appellant, to sustain a verdict for appellant in the amount that appellee admitted that it owed. p. 526.
3. **APPEAL.**—*Review.*—*Instructions.*—Where the issues were drawn and the case tried on the theory that there was an implied warranty of the goods sold to defendant, instructions stating the law upon that theory were not erroneous, and if plaintiff desired an instruction upon the written contract involved, it should have requested same. p. 528.
4. **APPEAL.**—*Review.*—*Harmless Error.*—*Instructions.*—Where no damages were allowed on appellee's cross-complaint, error, if any, in instructions given upon the question of damages claimed in such cross-complaint was harmless. p. 529.

From Howard Circuit Court; *William C. Purdum*, Judge.

Action by the Western Brass Manufacturing Company against the Haynes Automobile Company. From the judgment rendered, the plaintiff appeals. *Affirmed.*

Overton & Joyce, for appellant.

Blackledge, Wolf & Barnes, for appellee.

IBACH, C. J.—This is an action to recover a balance of \$269.78 claimed to be due appellant for brass rails and foot rests sold to appellee. The first paragraph of the answer is a general denial, the second a plea of payment. The third is based

on an alleged agreement to furnish appellee such rails as were fitted for use in the automobiles which it manufactured, and a failure to perform. It is also averred in this paragraph that many of the rails furnished were returned, leaving a balance due of \$42.52, which sum was tendered to appellant before suit. The fourth is designated a counterclaim for damages, in which it is averred that the rails delivered were not as ordered, and damages resulted therefrom. The fifth alleges that there was an implied warranty in the sale of the articles furnished that they would be reasonably suited for appellee's special use, but they were not, and were returned except to the amount of \$42.52. Issues were joined by a reply of general denial to each paragraph of answer except the first. Before the trial, there had been an offer to confess judgment for the amount not in dispute. There was a verdict and judgment for appellant for \$42.52 and costs to the time the offer to confess judgment was made. The errors assigned arise on the overruling of appellant's motion for a new trial.

Appellant asserts that the clause in the written contract, "above material to be A1 in all particulars," related only to the quality of the materials used in the manufacture of the articles embraced in the contract, and did not include fitness for any particular use. Preliminary to referring to the evidence, it is proper to state that each special answer and the pleading termed "counterclaim" proceeded upon the theory that the written warranty covered the reasonable fitness and suitability of the rails purchased for the uses intended. The fifth paragraph set up an implied warranty of fitness for use, and a violation of such warranty. No demurrer was filed to any of these pleadings.

Evidence was introduced by appellee to support the theories expressed in the pleadings, without objection. It is clear from the entire record that the trial proceeded upon the theory that the

1. question of an implied warranty was properly in the case and two of appellant's instructions were drawn upon that theory. This fact is also made apparent because appellant did not request a single instruction on the proposition that the written contract contained but a single warranty. Since both parties tried the case on the theory that appellee's pleadings were good in law, this court will not now permit appellant to change its position and uphold the contention that the judgment should be reversed for the reason that the written warranty as to the quality of the materials used in the articles purchased alone is involved in the case and controls the rights of the parties. *Terre Haute, etc., R. Co. v. Crawford* (1885), 100 Ind. 550, 553, 554; *Wilson v. Record* (1910), 45 Ind. App. 371, 374, 90 N. E. 906.

It is conceded that the contract in question was made by the McCullough Motor Supply Company on behalf of appellant. The evidence shows

2. that Mr. McCullough made the contract and at the time was informed that the brass rails purchased were to be manufactured for appellee to be used by it in the equipment of its motor cars. There is evidence which shows that both the foot rails and robe rails were inferior and not substantial. Quoting from the evidence, "A man taking hold of them in pulling himself up into the car which is natural, they would break and bend out of shape and the weight of a foot would bend the foot rail out of shape." Witness Lejuste, who represented appellee in the transaction, testified among other things that he had represented

the Apperson Brothers Company in the same capacity when purchasing brass rails to be used in automobiles manufactured by that company, but these goods were not as good as he had previously purchased for that company, although he believed that he was purchasing the same class of goods. The following letter written by appellee to appellant formed a part of the evidence:

“Replying to your letter of the 22d will say that it is true we specified lock joint robe and foot rails, but these rails are not as good as you furnished the Apperson Bros. Automobile Co. There must be something different so far as tubing is concerned. The writer is not positive of the fact, but thinks the tubing is of a lighter gauge.”

It was admitted by appellant that the materials sold were not suitable for rails more than thirty-three inches long, and were not generally recommended when the rails were to be longer, and yet the evidence shows that appellant knew when this sale was made that the rails used by appellee in its cars and specified in the contract were more than thirty-three inches in length. The contract provided that all materials were to be A1 in all particulars. After discovering that the rails furnished were not suitable for appellee's cars, a letter was written to appellant, of which the following is the material part:

“We must have better robe rails and foot rests, otherwise we will have to change the account. If you can not give us some in lock joint tubing, we will have to have seamless tubing as it is very evident to the writer that you are not using as heavy gauge materials as you have been in the past. We will thank you for an early explanation of the

matter. We are having a number of complaints from our customers, due to the fact that tubing used is entirely too light for the purpose.”

Six days after the receipt of this letter appellant replied that it would figure upon using something other than a “lock-joint rail.” On the following day, appellee wrote another letter to appellant requesting a change of materials, but in the meantime appellant continued to furnish the same rails, and then wrote to appellee that it had filled the order unless additional rails were needed. The evidence shows that the last shipment was made five days after the letter was written to appellant notifying it that the rails furnished were not fitted for the use intended, and that other rails would have to be furnished. There is much other evidence from which it could be reasonably inferred that appellant was furnishing imperfect and unsuitable rails. The evidence also shows that an offer was made by appellee to return the defective rails then in its possession. Although there is some evidence produced by appellant in conflict with that produced by appellee, there is ample evidence to support the verdict.

Many objections are urged to the instructions given by the court and to the action of the court in refusing some of those requested by ap-

3. pellant, but it is not necessary to discuss each objection separately. It is to be observed that appellee did not request any instructions interpreting the written contract and it may be stated that all the objections urged to the instructions given hinge on the proposition contained in them which had to do with implied warranties, when goods are sold to be fit and suitable for a particular use. It was upon the theory that there

was an implied warranty that the issues were drawn, and the case tried, consequently the instructions given upon that theory were within the issues and proper. If appellant desired an instruction which placed a construction upon the written contract, it should have requested it. But it seems apparent that, when the case was tried, no construction other than that placed on it by

4. the parties themselves was contended for.

It is not necessary to discuss the instructions given upon the question of the damages claimed by appellee in its cross complaint, because if incorrect, no harm came to appellant on account thereof, as no damages were allowed appellee on this branch of the case.

The verdict is clearly right on the evidence and we find no reversible error. *Lafayette, etc., R. Co. v. Adams* (1866), 26 Ind. 76; *Perry v. Makemson* (1885), 103 Ind. 300, 2 N. E. 713. Judgment affirmed.

NOTE.—Reported in 112 N. E. 108. As to privilege of returning goods purchased as bar to claim for breach of warranty, see Ann. Cas. 1915 D 1159.

STIGLITZ v. MIGATZ, EXECUTOR.

[No. 9,151. Filed October 13, 1915. Rehearing denied April 5, 1916.]

WILLS.—*Provision for Widow.*—*Election.*—*Statutes.*—While a widow's acceptance of the provisions of her deceased husband's will does not in all cases preclude her from the widow's allowance of \$500 as provided for by §2786 Burns 1914, §2269 R. S. 1881, it does do so where the provisions of the will are inconsistent with her claims under the statute; hence where the will of appellant's deceased husband disposed of the whole estate and showed an intent to limit appellant's interest to the provision made for her, her election to take under the will was binding and precluded her from any right to an allowance under the statute.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Mildred Stiglitz against Nathan Migatz, executor of the last will and testament of William Stiglitz, deceased. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

Fred Barnett and Lyle McKinney, for appellant.

Gavit & Hall and McMahon & Conroy for appellee.

MORAN, J.—The question to be decided by this appeal is whether appellant as the widow of William Stiglitz is entitled to the statutory allowance of \$500, in addition to the provisions made for her by the last will of her deceased husband. The lower court disallowed appellant's claim for the statutory allowance, thus holding that she was entitled only to the provisions made for her by the will of her deceased husband. The error assigned is the overruling of the motion for a new trial, under which it is insisted that the decision reached by the trial court is not sustained by sufficient evidence and is contrary to law. So much of the will as is necessary to present the question under consideration is:

"Item I. I give and bequeath to my beloved wife Millie Stiglitz all of the real estate I may die siezed of, except the real estate at No. 70 and 72 Plummer Avenue, Hammond, Indiana. Item II. I give and bequeath to my beloved sisters and brothers, viz.: Mrs. Rosa Truen, Mrs. Ricka Winter, Mrs. Hannah Pitzele, Mrs. Rosa Rosener, Mrs. Lena Cohn, Mrs. Betta Miggots, David Stiglitz, Jacob Stiglitz, Lozor Stiglitz, and Marcus Stiglitz to be divided between them share and share alike, and I also give and bequeath all my stock of general merchandise to the above

named brothers and sisters, them to pay all of the debts against it and to pay all my burial expenses and pay \$100.00 to the Kanasih Jewish Society of Hammond, Indiana, and pay \$20.00 to Rosa Ringer and pay to Cohan Fisher \$20.00. Item III. I give and bequeath to my beloved wife Millie Stiglitz all the certificates of stock I may die siezed of, American Savings and Trust Company, Masonic Temple at Hammond, Indiana, and German Fadalia Singing Society. And I give and bequeath to my beloved wife all cash on hand or money in Bank, and all my book accounts except a note and open account due me from Miggots and Stiglitz at Whiting, Indiana, and said note and account to be paid by Miggots and Stiglitz to my beloved wife, Millie Stiglitz, one half of the same in two equal installments, and the diamonds and jewelry I have for safe keeping is to be returned to the owner Mrs. H. Pitzele, said diamonds and jewelry is now in the safety deposit vault Germ. Nat. Bank at Hammond, Indiana."

William Stiglitz at the time of his death was the owner of real estate of the value of \$5,050; the value of the real estate devised to appellant was \$2,850; the remainder, which the lower court in a former action construing the will found was devised to the brothers and sisters of decedent was of the value of \$2,200. The appellant took possession of the real estate before the filing of her claim. The personal property left by decedent was of the value of \$13,886.92 of which appellant received \$1,886.92; the balance was bequeathed to the brothers and sisters of the decedent, subject to the payment of the debts against the general store and funeral expenses.

The statute, under which the claim was filed in this cause provides among other things that a widow of the deceased husband, whether he died

testate or intestate, is entitled to articles of personal property to the value of \$500, or she is entitled to the same in cash; and if there is not a sufficient amount of personal property out of which to satisfy the \$500, then, to that extent, the claim becomes a lien upon the real estate of the decedent, which will be liable therefor. §2786 Burns 1914, §2269 R. S. 1881. It is urged by appellant that this statute entitled the widow to \$500 out of her husband's estate, as a preferred claim, which is senior to all demands against the estate, save expense of administration, last sickness and funeral expenses (*Comer v. Light* [1911], 175 Ind. 367, 93 N. E. 660, 94 N. E. 325), and that it is analogous to dower, and can not be defeated by the husband by testamentary provisions. *Shipman v. Keys* (1891), 127 Ind. 353, 26 N. E. 896; *Claypool v. Jaqua* (1893), 135 Ind. 499, 35 N. E. 285; *Welch v. Collier* (1901), 27 Ind. App. 502, 61 N. E. 757.

There is a want of harmony in the authorities as to the construction the statute under consideration should receive, and appellant's contention inferentially finds support in some of the authorities cited. However, throughout the existence of the statute which is the foundation of the widow's right in this cause, the language has been slightly varied by amendments, which, no doubt, accounts to some extent for the want of harmony in the adjudicated cases construing the same, as aforesaid. Since 1881, the statute has not been amended, and the decisions hereinafter referred to and cited are based upon actions which arose since this date. That the allowance of \$500 as provided by statute for widows is of such a nature and character as is not susceptible of being defeated by any act of the husband may well be conceded as contended for by appellant. However, under

many of the decisions of this and the Supreme Court, and especially those of more recent date, it is held that the widow may by her own conduct relinquish the same by electing to take other testamentary provisions made for her.

In the case of *Langley v. Mayhew* (1886), 107 Ind. 198, 6 N. E. 317, 8 N. E. 157, the court in speaking of the cases that were cited in support of the doctrine that the widow was entitled to the allowance of \$500, in addition to any provision made for her by will, said, "Some of the cases cited, and possibly others, have gone to an extreme limit in holding that widows were respectively entitled to receive a specific sum of money, under the law, in addition to the provisions made for them by their husbands in their wills, and, in consequence, we feel it incumbent upon the court hereafter to limit, rather than extend, the doctrine of those cases." In the case of *Manning v. Wilson* (1912), 52 Ind. App. 1, 100 N. E. 106, which is the last expression of this court on the question under consideration, it was held that there has been a great relaxation in the rule by the decisions handed down since *Langley v. Mayhew*, *supra*, to the effect that the widow may relinquish her right to the allowance given her by statute, by accepting specific testamentary provisions made for her. By the great weight of the adjudicated cases, it may now be stated as a general proposition of law that the acceptance by the widow to take the provisions made for her by will does not prevent her from being entitled to the allowance provided by statute; but if the provisions made by will are inconsistent with her claim to personalty given by statute, an acceptance under the will is a waiver of her claim to such personalty; that is, if the property is so disposed by will as to evince a clear in-

tention to limit the interest of the widow to the provisions so made for her, her election to take under the will will be binding, and she can not claim the additional allowance of \$500, as provided by statute. *Pierce v. Pierce* (1898), 21 Ind. App. 184, 51 N. E. 954; *Whisnand v. Fee* (1898), 21 Ind. App. 270, 52 N. E. 229; *Welch v. Collier*, *supra*; *Manning v. Wilson*, *supra*; *Boord v. Boord* (1904), 163 Ind. 307, 71 N. E. 891; *Langley v. Mayhew*, *supra*; *Hurley v. McIver* (1889), 119 Ind. 53, 21 N. E. 325; *Shafer v. Shafer* (1891), 129 Ind. 394, 28 N. E. 867; *Snodgrass v. Meeks* (1895), 12 Ind. App. 70, 38 N. E. 833; *Whetsell v. Loudon* (1900), 25 Ind. App. 257, 57 N. E. 952.

So, in the case at bar, we are confronted with the proposition: Does the assertion of appellant to both claims defeat the intention of the testator? In arriving at the intention of a testator, much stress is laid by many of the decisions upon the relative value of the estate provided by will and the estate a widow would be entitled to under the law. The fact, however, that the provisions made for a widow under the will are more favorable than the estate the widow would be entitled to under the law, or that the converse is true, is not of controlling influence in ascertaining whether the testator intended that the estate provided by will was in lieu of the widow's statutory rights, but it is a circumstance to be considered in arriving at the intention of the testator. We can not say in the case at bar, that the estate provided by the will, omitting the \$500 as provided by statute, is equal to or of greater value than that which the law would cast upon the widow, as we are not advised as to what debts were owing by the decedent at the time of his death as against the store, nor the amount of funeral expenses, which

debts and funeral expenses were to be paid out of the property bequeathed to the brothers and sisters of the testator. The will under consideration disposed of the entire estate and made specific testamentary provisions for appellant, as the widow, free from debts and funeral expenses, as aforesaid. The allowance of appellant's claim under the statute would disturb a part of the estate that was cast upon the other beneficiaries named in the will, which fact was within the knowledge of appellant when she elected to take under the will. When the will is viewed as a whole and in the light of the authorities, the conclusion reached is that the testator's intention was that his widow should have the estate as provided in the will and no more, and that her election to take under the will is inconsistent with her claim to the statutory allowance of \$500. Judgment is therefore affirmed.

NOTE.—Reported in 109 N. E. 809. As to when widow is required to elect, see 92 Am. St. 695. As to what constitutes election to take under or against a will, see 49 L. R. A. (N. S.) 1072.

LUTHER v. BASH ET AL.

[No. 9,031. Filed April 6, 1916.]

1. **FRAUDS, STATUTE OF.—Requirement of Writing.—Compliance.**—Generally a contract required by law to be in writing must be wholly so in order to be enforceable as a written contract, since a contract partly in writing and partly in parol is a parol contract. p. 539.
2. **CONTRACTS.—Commissions.—Sales of Real Estate.**—In an action by one seeking the collection of commission for services rendered against the owner of real estate disposed of, plaintiff must show a substantial compliance with the statute requiring the contract to be in writing in order to recover. p. 539.
3. **CONTRACTS.—Commissions.—Sales of Real Estate.—Statutes.**—While the manifest purpose of the statute (§7463 Burns 1908, Acts 1901 p. 104) requiring contracts for the payment of commissions for the sale of real estate to be in writing was to protect owners of real estate against imposition and fraud on the part of

real estate agents, it was not intended to enable the landowner to commit fraud or imposition upon the agent; and hence, while the statute must be substantially complied with, its operation should not be extended further than necessary to make its spirit and purpose effective. p. 534.

4. **CONTRACTS.**—*Matter Implied.*—Whatever may be fairly implied from the terms or nature of an instrument is, in the judgment of law, contained in the instrument and is as much a part thereof as that which is expressed. p. 540.
5. **CONTRACTS.**—*Commissions.*—*Sales of Real Estate.*—*Statutes.*—Under §7463 Burns 1908, Acts 1901 p. 104, requiring contracts for the payment of commissions for the sale of real estate to be in writing, a contract to pay brokers two per cent of cash or property received in trade for a farm, was enforceable against the owner of such farm, who had declined to convey after a purchaser had been procured, although the exact amount of the commission could not be ascertained without the aid of parol evidence, since the reception of such parol evidence would be merely explanatory to aid the court in applying the contract to the subject-matter, and could not be deemed as supplying any essential part of the contract. p. 540.

From Henry Circuit Court; *John F. LaFollette*, Special Judge.

Action by William E. Bash and another against Sarah Peele Luther. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Bundy & Jones, for appellant.

Clarence Brown and John O. Spahr, for appellees.

MORAN, J.—Appellees recovered a judgment for \$430 against appellant upon a broker's contract for commission alleged to be due for services rendered in disposing or attempting to dispose of appellant's farm in Jackson County, Indiana. The question presented upon the sufficiency of the complaint to withstand a demurrer is likewise presented on the conclusions of law rendered by the court on the facts specially found, and as a matter of convenience will be disposed of under the assignment of error questioning the action of the court in stating its conclusions of law.

The special finding of facts in substance discloses that appellees were engaged in the brokerage business in the city of Indianapolis, and entered into a contract with appellant to dispose of a farm of 360 acres located near Crothersville, Jackson County, Indiana, and known as the "Vernon" farm, under the terms of the following agreement:

"Indianapolis, Indiana, March 24, 1910. Bash & Bash, Indianapolis, Indiana. Gentlemen:—You are hereby authorized to undertake the sale of my farm of 360 acres located near Crothersville, Indiana, and if sold or traded to any one procured through you for any price or consideration satisfactory to me in either cash or other property in trade, I agree to pay you the customary commission of two per cent thereon. (Signed) Sarah Peele."

That, acting under the foregoing agreement, appellees procured one T. A. White to examine the farm, who was desirous of exchanging Indianapolis property therefor; that on March 15, 1910, T. A. White examined the "Vernon" farm, and on March 24, 1910, appellant examined the White property in the city of Indianapolis; that the amount of the incumbrances, the value of the properties, the terms and conditions of the trade were discussed by the parties respectively, and on April 5, 1910, appellant made a written offer to T. A. White for the trade of her farm for his Indianapolis real estate as follows:

"Crothersville, Indiana, April 5, 1910. T. A. White: I hereby offer to trade my equity in the farm known as the 'Vernon' farm and T. A. White to pay me \$1,000.00 in money for his property corner New Jersey Street and East 22nd Street and 58, 60, 62 and 64 Cornell

Avenue, Indianapolis, Indiana, for the equity.
(Signed) Sarah Peele."

That on April 6, 1910, the foregoing written offer was received by appellees, Bash & Bash, and through them, on April 10, 1910, T. A. White accepted appellant's offer in writing by writing at the bottom thereof, "Accepted if closed by May 5, 1910, T. A. White", and on April 12, 1910, appellee William E. Bash mailed through the United States mail a copy of the acceptance to appellant, which was received by her in the due course of mail, and at the time of the acceptance T. A. White was ready and willing to consummate the trade and exchange of properties and ready and willing to close the deal, but appellant refused to carry out the terms of the offer and the trade was never completed. The value of appellant's farm was \$21,500, and the value of T. A. White's property was \$20,000. That Sarah Peele intermarried with one W. J. B. Luther after the signing of the contract. The conclusions of law rendered on the facts found were that the law was with appellees and that they were entitled to recover \$430 from appellant.

It is appellant's position that the essential elements of a written contract, as required by statute, are wanting in this cause, in that parol evidence must be resorted to in order to determine the amount of commission appellees are entitled to recover, if any. The statute here under consideration provides: "That no contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative." §7463 Burns 1908,

Acts 1901 p. 104. As a general proposition, it can be stated that a contract required by

1. law to be in writing must be wholly so in order to be enforceable as a written contract; that a contract partly in writing and partly in parol is a parol contract, and does not satisfy a statute which calls for a written contract as here under consideration. *Zimmerman v. Zehendner* (1905), 164 Ind. 466, 73 N. E. 920, 3 Ann. Cas. 655; *Porter v. Patterson* (1908), 42 Ind. App. 404, 85 N. E. 797; *Selvage v. Talbott* (1911), 175 Ind. 648, 95 N. E. 114, 33 L. R. A. (N. S.) 973, Ann. Cas. 1913 C 724; *Waddle v. Smith* (1915), 58 Ind. App. 587, 108 N. E. 537.

The immediate infirmity urged by appellant as to the contract under consideration is that the language "I agree to pay you the customary

2. two per cent thereon" furnishes no basis upon which to calculate the amount of commission due appellees, if any. In actions of the class to which the one at bar belongs, the party seeking the collection of commission for services rendered against the owner of real estate disposed of must show a substantial compliance with the statute requiring the contract to be in writing in order to recover. *Morton v. Gaffield* (1912), 51 Ind. App. 28, 98 N. E. 1007; *Price v. Walker* (1909), 43 Ind. App. 519, 88 N. E. 78; *Provident Trust Co. v. Darrough* (1907), 168 Ind. 29, 78 N. E. 1030.

It has been held that the manifest purpose of the statute under consideration is to protect owners of real estate against the imposition

3. and fraud of real estate agents in attempting to collect for services alleged to be performed in the disposition and sale of real estate where the claim was of doubtful character, but that the statute was not intended to enable the landowner

to commit fraud or imposition upon the agent; and that the statute must be substantially complied with; but that the operation of the statute should not be extended further than necessary to make its spirit and purpose effective. *Selvae v. Talbott, supra*; *Doney v. Laughlin* (1912), 50 Ind. App. 38, 94 N. E. 1027; *Zimmerman v. Zehendner, supra*; *Beahler v. Clark* (1904), 32 Ind. App. 222, 68 N. E. 613.

The contract in the case at bar, as we have seen, provides that appellees were to receive a commission of two per cent for the services

4. to be performed by them in disposing of appellant's real estate in the manner provided. When the language in reference to

5. the two per cent is read in connection with all the language employed in the drafting of the contract, and in the light of the subject-matter, it can be fairly inferred that the two per cent was to be calculated upon the amount appellant was to receive for the real estate. Whatever may be fairly implied from the terms or nature of an instrument is, in the judgment of law, contained in the instrument. 6 R. C. L. 856. In other words what is implied in an express contract is as much a part of the contract as what is expressed. *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.* (1869), 8 Wall. 276, 19 L. Ed. 349; *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337, 64 N. E. 680. Thus the only element omitted from the contract in the light of the foregoing authorities is the given amount upon which the two per cent was to be calculated. At the time of entering into the contract, the price the farm was to be sold for was not, as is disclosed by the contract, agreed upon, but it was provided that if appellees sold or traded appellant's farm for a price or consideration

satisfactory to her, either in cash or in the exchange of other property, appellees were to receive a commission of two per cent therefor. After entering into the contract, appellant, through the efforts of appellees, addressed a written proposition to one T. A. White, expressing her desire to exchange her farm listed with appellees for his Indianapolis property providing he paid her a difference of \$1,000. This proposition was accepted by T. A. White in writing, and thus there was a meeting of the minds of the parties as to the properties to be exchanged and the payment of the difference by T. A. White. The trial court permitted parol testimony to be resorted to for the purpose of establishing what appellant was to receive for her farm, which as is disclosed was \$21,500, and upon this amount the two per cent was computed by the trial court. Now, if an essential part of the contract was supplied by parol evidence resorted to, then appellees must fail, as the contract must be regarded as a parol contract and in derogation of the statute, which requires contracts of this character to be in writing. The parol evidence resorted to brought to the court the amount appellant was to receive for her farm, but did not vary the terms of the written instrument entered into authorizing appellees to procure a purchaser for her farm, nor did it vary the terms of the written proposal by appellant and the acceptance by T. A. White. If the evidence thus admitted went to the form and not to the substance of the written instrument and was only explanatory and for the purpose of aiding the court in applying the written instrument to the subject-matter, then no essential part of the same was supplied by parol evidence. It was said in *Doney v. Laughlin*, *supra*, in reference to the statute under consider-

ation that parol testimony may be admitted to enable the court to properly apply the contract to the subject-matter to make possible an intelligent application of it to the subject of the contract. In *Ames v. Ames* (1910), 46 Ind. App. 597, 91 N. E. 509, where it was insisted that the description of real estate was not sufficient to compel specific performance, it was said: "It is well established that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be used to complete the description and identify the property." In *Morton v. Gaffield*, *supra*, the contract under consideration read "November 1, 1907, listed my farm of 120 acres at 35 per acre on a commission of \$1.00 per acre to be cash. James T. Morton". It was there said, "So in the case at bar, we think it was competent to show that the 120 acres of land described in the complaint was the land on which the minds of the parties met at the time the memorandum was signed. * * * And the land in regard to which the parties contracted may be shown by parol proof to be the land described in the complaint."

In addition to the minds of the parties meeting upon the express stipulations of the instruments, their minds also met as to the real basis upon which the two per cent was to be computed viz., the consideration appellant was to receive for her property. This was not known either in money or property at the time the contract was entered into and could not be known until appellee's compensation was earned by procuring a purchaser willing, ready and able to purchase appellant's property at a money consideration satisfactory to

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her or in consideration of the exchange of other property satisfactory to her. Hence, when the negotiations reached this stage in the course of the dealing as it did from the finding of facts, the actual amount upon which to make the computation of two per cent was determined. Now, to allow this fact to be supplied by parol proof was not supplying an essential element or ingredient of the written instruments as nothing was added to the same but to enable the court to properly apply the written instruments to the subject-matter under consideration.

No error was committed by the trial court in stating its conclusions of law on the facts specially found. The conclusion thus reached disposes of the questions presented by the action of the court in overruling appellant's motion for a new trial. There is no error in the record calling for a reserval of the judgment. Judgment affirmed.

NOTE.—Reported in 112 N. E. 110. Generally as to necessity that agent's authority to purchase or sell real property be in writing to enable him to recover compensation for his services, see 44 L. R. A. 601, 9 L. R. A. (N. S.) 933, 46 L. R. A. (N. S.) 129. As to power of legislature to require contracts for commissions for finding a purchaser for real estate, to be in writing, see 33 L. R. A. (N. S.) 973. As to the right of a real estate broker to recover commissions under an oral contract of employment where statute requires written contract, see 13 Ann. Cas. 977; Ann. Cas. 1915 A 1133.

HAMMOND, WHITING AND EAST CHICAGO RAIL- WAY COMPANY v. KAPUT.

[No. 8,736. Filed November 4, 1915. Rehearing denied April 6, 1916.]

1. *APPEAL.—Payment of Judgment.—Prosecution of Appeal.—Effect.*—Under §671 Burns 1914, §632 R. S. 1881, inhibiting a person who obtains a judgment from taking an appeal therefrom after receiving any money paid or collected thereon, the mere payment of a judgment or a part thereof by a judgment defendant does not necessarily estop him from prosecuting an appeal therefrom. p. 548.

2. **APPEAL.—Moot Questions.—Dismissal.**—Where it appears that the controversy has been settled, or that the appealing party has no further interest therein, the appeal will be dismissed. p. 548.
3. **COMPROMISE AND SETTLEMENT.—Settlement of Litigation.—Attitude of Courts.**—Settlements of litigation between the parties either in or out of court, when made in good faith, are commendable and should be encouraged, since they usually end the controversy and leave nothing for the court to do except to show a disposition of the case in accord with the settlement. p. 549.
4. **ATTORNEY AND CLIENT.—Compensation of Attorney.—Equitable Lien.**—Where a fund has been secured to the client by the efforts of his attorney, and the compensation of the attorney is either expressly or impliedly such a charge against the fund as to amount to an assignment of some part thereof, equity will aid the attorney in the enforcement of his claim. p. 549.
5. **ATTORNEY AND CLIENT.—Compensation of Attorney.—Settlement with Client.—Rights of Attorney.**—The settlement of a case between plaintiff and defendant made after a judgment has been rendered for plaintiff and without the knowledge or consent of plaintiff's attorneys, who have taken a lien of record for their fee, is a constructive fraud on such attorneys, and they may assert and enforce their interest in the judgment regardless of the settlement. p. 550.
6. **ATTORNEY AND CLIENT.—Attorney's Lien.—Protection by Courts.—Settlement Between Parties.—Dismissal of Appeal.**—Where attorneys for plaintiff in an action for personal injuries filed a lien on the judgment obtained for him, from which judgment defendant appealed, and while the appeal was pending defendant settled with plaintiff in full without the knowledge or consent of his attorneys, a dismissal of defendant's appeal was required in order to preserve the lien rights of plaintiff's attorneys as against defendant, since the settlement was a constructive fraud on plaintiff's attorneys, which the court could not aid by a possible reversal of the judgment. p. 551.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Mike Kaput against the Hammond, Whiting and East Chicago Railway Company. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Peter Crumpacker and *F. C. Crumpacker*, for appellant.

D. J. Moran, for appellee.

HOTTEL, J.—This is an appeal from a judgment of \$1,200 obtained by appellee in an action brought by him against appellant for personal injuries alleged to have been received while alighting from one of appellant's cars. Appellee has filed a motion, verified by his attorney, to dismiss the appeal on the ground that appellant has settled with appellee and that the question now presented by the appeal is a moot one. This motion recites, among other things, the following: that on April 22, 1913, appellant's motion for a new trial was overruled by the trial court and judgment entered on the verdict; that on May 15, 1913, appellee's attorneys of record below, D. J. Moran and C. E. Greenwald, gave notice of an attorney's lien by endorsing the same on margin of the record of the judgment in this cause, signing the same and having it attested by the clerk of the Lake Superior Court; that the transcript of the record was filed in this court September 16, 1913; that appellant's original brief was filed January 14, 1914; that appellee's brief was filed February 14, 1914, and appellant's reply brief was filed February 28, 1914; that prior to January 12, 1914, one H. C. Green, who is general manager of appellant and in charge of its affairs in the State of Indiana opened up negotiations with appellee's attorneys with the view of settling appellee's cause of action, securing an accord and satisfaction of the judgment; that the negotiations as far as appellee's attorneys knew or were concerned were dropped without any agreement being reached; that on or about March 14, 1914, in George Girard's saloon in the city of Whiting, Indiana, H. C. Green, said general manager for the appellant, informed Charles E. Greenwald that he had settled the above en-

titled cause of action with the appellee, Mike Kaput, by paying to said Kaput a certain sum of money, towit, \$150, which said sum was the sole and only consideration paid for the settlement of appellee's cause of action and satisfaction of said judgment; that the judgment in this cause has not been satisfied of record, but that some sort of an agreement of release and satisfaction of the judgment and appellee's cause of action has been secured by appellant from appellee, that neither appellant nor appellee has paid and satisfied the lien of appellee's attorneys for fees for securing the judgment in this cause, and the fees have not been paid or satisfied; that the only purpose appellant has in permitting the cause to go to final decision in this court is to prevent, if possible, and if not to hinder and delay, appellee's attorneys from collecting their attorneys' fee and enforcement of the lien thereof.

To this motion, appellant has filed a verified answer which reads as follows: "The appellant, for verified answer to appellee's motion to dismiss the above entitled appeal, represents to the court that on the 15th day of May, 1913, after judgment had been entered in the court below, appellee's attorneys of record gave notice of an attorney's lien, by endorsing on the margin of the record of said judgment a statement to the effect that they were claiming a lien for attorneys' fees against said judgment in the sum of six hundred dollars; that subsequently appellee himself called at the office of appellant, in the city of Hammond, on several occasions, and suggested and solicited a settlement of his claim and of said judgment; that appellant, through its then manager, Henry C. Green, after he had been so solicited several times by appellee, made a settlement of said judgment

with said appellee, paying him the sum of one hundred fifty dollars (\$150.00), as consideration for the settlement of the same and accord and satisfaction of said judgment; that thereafter appellant, acting through its manager, offered Charles E. Greenwald, one of the attorneys for the appellee, a certain sum of money in satisfaction, release and discharge of whatever claims said attorneys might have, by reason of said lien endorsed on the margin of said judgment record; that the said Greenwald refused to accept the same; that the questions presented by the appeal in this case are not moot, but that there is involved in said appeal the question of the right of said attorneys to enforce said judgment and their lien thereon, and to proceed further with this cause for the purpose of determining their right to attorneys' fees; that said judgment has not been satisfied of record and said lien has not been discharged, and if this appellant is successful on appeal and said cause is reversed, the appellant will not be required to pay said attorneys anything in satisfaction of said lien; on the other hand, if the judgment is affirmed, the rights of said attorneys are protected and they can proceed as the law authorizes and permits under the circumstances; that the settlement of said cause of action and the accord and satisfaction of said judgment has been effected since the appeal in the cause was perfected and after all the briefs were filed; that it can have no effect upon the appeal and should not in any wise interfere with the final disposition of this suit. Wherefore", etc.

A provision of our statute (§671 Burns 1914, §632 R. S. 1881), inhibits a person who obtains a judgment from taking an appeal therefrom "after receiving any money paid or collected thereon".

The fact that this proviso of the statute

1. is limited in its application to the party *obtaining a judgment and receiving any money thereon* evidences the fact that in enacting such proviso the legislature recognized a distinction between a judgment plaintiff and a judgment defendant. The reason for the recognition of such distinction is obvious, as there is "an essential difference between one who pays a judgment against him and one who accepts payment of a sum awarded him by a judgment". This is so because payment by the judgment defendant may often be necessary to protect the property of such defendant from sacrifice, and payment under such circumstances, either in law or reason, ought not to preclude the party so paying from assailing the judgment. It follows that mere payment of a judgment or a part thereof by a judgment defendant does not necessarily estop him from prosecuting an appeal therefrom. *Cleveland, etc., R. Co. v. Nowlin* (1904), 163 Ind. 497, 499, 72 N. E. 257, and authorities cited. However, where it appears that the controversy has been settled, or that the appealing party has no further interest therein the appeal will be dismissed. *Ogborn v. City of Newcastle* (1912), 178 Ind. 161, 98 N. E. 869, and cases cited; *South Park Floral Co. v. Garvey* (1915), 182 Ind. 635, 107 N. E. 68; *Payne v. Pugh* (1913), 54 Ind. App. 551, 103 N. E. 117; *Howard v. Happell* (1914), 181 Ind. 165, 103 N. E. 1065; *Chicago, etc., Co. v. Lewis* (1901), 156 Ind. 232, 59 N. E. 466; *State, ex rel. v. Indianapolis Gas Co.* (1904), 163 Ind. 48, 71 N. E. 139.

The real question, therefore, which we are called on to determine in this case is whether, under the showing here made, the controversy involved in

this appeal has been settled, or if not settled, whether the conduct of the appellant has been such as to estop it from asserting that such controversy has not been settled and estop it from claiming that it is entitled to have the questions presented by its appeal reviewed and passed on by this court. A settlement of a litigation

3. between the parties thereto either in or out of court, when made in good faith is commendable and should be encouraged. Such settlements usually end the controversy and leave nothing for the court to do except to show a disposition of the case in accord with the settlement. Appellant admits settlement with appellee, but says, in effect, that the controversy has not been settled in its entirety, because appellee's attorneys have of record a lien on the judgment below which, if such judgment is permitted to stand, may be enforced and collected from appellant by the attorneys, and that, if appellant is permitted to proceed with its appeal, and succeeds in reversing the judgment below, it will thereby destroy the judgment on which the lien is based and avoid the payment of the fee. It is argued that, on account of such lien, appellant still has an interest in procuring a reversal of the judgment and that this interest is one which the court should protect and preserve, and hence that the question for the disposition of the court is not moot.

Where a fund has been secured to the client by the efforts of his attorney, and the compensation for the attorney's services is either expressly

4. or impliedly such a charge against the fund as to amount to an assignment of some part thereof "equity will aid the attorney in the enforcement of his claim, ordinarily called a lien". *Koons v. Beech* (1897), 147 Ind. 137, 45 N. E. 601,

46 N. E. 587; *Justice v. Justice* (1888), 115 Ind. 201, 16 N. E. 615; *Puett v. Beard* (1882), 86 Ind. 172, 44 Am. Rep. 280; *Miedreich v. Rank* (1907), 40 Ind. App. 393, 82 N. E. 117. However, we have in this State a statute (§8278 Burns 1914, §5276 R. S. 1881), which expressly authorizes and provides a method for obtaining a lien for such services. A discussion of the rights and duties of the courts in the matter of protecting and enforcing the attorney's claim or lien in such cases and the method of procedure to be followed will be found in the following cases: *Nichols v. Katres* (1914), 57 Colo. 471, 140 Pac. 792; *Covington v. Bass* (1890), 88 Tenn. 496, 12 S. W. 1033; *Jones v. Duff Grain Co.* (1903), 69 Neb. 91, 95 N. W. 1; *Zentmire v. Brailey* (1911), 89 Neb. 158, 130 N. W. 1047; *Dahlstrom v. Featherstone* (1910), 18 Idaho 179, 110 Pac. 243; *Nielsen v. City of Albert Lea* (1904), 91 Minn. 388, 98 N. W. 195; *Peterson v. Struby* (1900), 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599; *Hanna v. Island Coal Co.* (1892), 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. 246, note; *Flint v. Hubbard* (1901), 16 Colo. App. 464, 66 Pac. 446; *Desaman v. Butler Bros.* (1912), 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913 E 642, note; *Cameron v. Boeger* (1902), 200 Ill. 84, 65 N. E. 690, 93 Am. St. 165, 169, note; 2 R. C. L. 1080, §171. We need give no time to a discussion of the validity or character of the claim or lien of appellee's attorneys because, for the purpose of the question under consideration, appellant admits that appellee's attorneys have a lien on the judgment from which the appeal is taken.

Indeed, appellant's resistance of the motion to dismiss the appeal is predicated solely on the existence of such lien, and by its own ad-

5. mission its sole object and purpose in further prosecuting the appeal is to obtain a

reversal of the judgment below in order

6. that it may avoid the enforcement of said lien against it, and entirely escape the payment of the attorneys' fees thereby secured. In some of the cases, *supra*, notably *Meidreich v. Rank*, it is held, in effect, that where the plaintiff's attorney has obtained a judgment for his client and has a lien thereon of record for his fees that a settlement between the defendant and plaintiff, in the absence of and without the knowledge of plaintiff's attorney is a constructive fraud on such attorney. Applying the legal principles recognized and announced in that case and the cases there cited to the instant case, it would seem that, in view of the fact that the settlement with appellee was effected and obtained by appellant without the knowledge or consent of appellee's attorneys, a constructive fraud was practiced on such attorneys, and that because thereof such attorneys, as to their interest in said judgment, are not bound by such settlement and they may assert and enforce such interest regardless of such settlement. This being true, it would seem necessarily to follow that appellant would have a corresponding or reciprocal interest in avoiding such judgment which it would be entitled to have protected and preserved by a determination of its appeal on its merits, unless by the constructive fraud so practiced by it, as indicated, it has estopped itself from asserting such right.

In this connection, it is proper to say that it seems to be appellant's idea that, inasmuch as there was no attempt between appellant and appellee to settle the fees of appellee's attorneys, and because the judgment was left unsatisfied so that appellee's attorneys may enforce their lien, in case the judgment is upheld by this court, that

there was no fraudulent collusion between appellant and appellee to defeat the attorneys in the enforcement of their lien within the meaning of the cases cited. It is true that the facts of the instant case do apparently differ, in such respect, from any of the cases herein cited, and if this court should do what appellant seeks to have it do, viz., consider its appeal on its merits and reverse the judgment below, and appellee's attorneys should then, in an independent action, seek to recover damages because of the collusion and fraud of appellant and appellee in the making of the settlement, it might be urged by appellant with some degree of plausibility that such settlement could not have operated as a constructive fraud on such attorneys. This would be so because a reversal of the judgment below by this court is necessary to consummate and give to such settlement an effect prejudicial to appellee's attorneys and hence, in the absence of such action of the court, no damages would result to such attorneys on account of such settlement. It seems to us, however, that such a contention is an argument against rather than in favor of the court considering the appeal on its merits, and thereby taking the chance of being compelled to reverse the judgment below with the result that, by such action, a constructive fraud will be consummated on the attorneys.

We know and appellant concedes that a reversal of the judgment below would destroy the lien of appellee's attorneys and hence prevent the enforcement of such lien against appellant. Such fees and the lien therefor being dependent on a judgment against appellant and appellant having settled with appellee, it would also follow that, in case the judgment below is reversed, such attorneys would likewise lose all opportunity to obtain

another judgment and thereby collect their fee from appellant, unless this court on reversing the present judgment (if on investigating the merits of the appeal a reversal should be found necessary) could order a new trial with instructions to the trial court to allow the appellee's attorneys to proceed with the trial of the cause in their own behalf, regardless of appellant's settlement with their client. Indeed appellant claims that a reversal of the judgment below will not only relieve it from the enforcement of the present attorney's fee lien but will also relieve it from any liability on account of appellee's attorneys' fees and, as before indicated, it admits that it is to secure such end that it is now seeking to prosecute its appeal and obtain a reversal of the judgment below. This is, in effect, a concession by appellant that it has been guilty of the conduct which, under the authority of *Meidreich v. Rank, supra*, amounts to a constructive fraud on appellee's attorneys, provided only that it may secure the aid of this court and obtain a reversal of the judgment below. In other words, the aid of this court, by way of a reversal of the judgment below is necessary to give appellant the benefit of its settlement as against appellee's attorneys and hence necessary to give effect to the constructive fraud so attempted to be practiced on the attorneys. It is the duty of a court of justice to prevent, rather than aid in making possible, such a result, and it seems that to prevent such result this court must either dismiss the appeal, and let the judgment below stand for the benefit of such attorneys, or otherwise pursue the course above suggested, if on investigation of the questions presented by the appeal a reversal of the judgment below is found to be necessary, it should grant a new trial with instruc-

tions to the trial court to permit appellee's attorneys to proceed with the case below for their own benefit, regardless of the settlement between appellant and appellee.

Inasmuch as we have no statute in this State providing for a lien by an attorney on his client's cause of action, there might be some question whether, under the law, this court, upon reversing the judgment below, would be authorized to direct the trial court to allow the plaintiff's attorneys to proceed with the case below in their own behalf, and, in any event, the ends of justice will, in our judgment, be better served by dismissing the appeal and allowing the present judgment to stand for the purpose of preserving the lien of appellee's attorneys for whatever it may be worth to them. Under the facts in this case, appellant is in no position to complain of such a result.

This conclusion is expressly supported, we think, by the case of *Nichols v. Katres*, *supra*, and is impliedly supported by the principles announced in many of the cases herein cited. We may adopt the concluding statement of the court in the case of *Nichols v. Katres*, *supra*, as entirely applicable to the facts of this case, viz., "The only question remaining over which a dispute or legal controversy might arise, is the attorney's lien, its amount and enforcement, which controversy must be settled in the first instance in the lower court. *Nichols*, having settled the case with *Katres*, cannot now prosecute the writ of error for the purpose of defeating an alleged attorneys' lien which is all there is left in the case."

For the purposes of the question here considered we have assumed that the settlement between appellant and appellee was valid and binding as

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between the parties because in this respect the settlement is not questioned. Appeal dismissed.

NOTE.—Reported in 110 N. E. 109. As to lien of attorneys, see 51 Am. St. 251. As to the right of a party who recovers judgment for less than his demand to appeal after satisfaction of judgment, see 16 Ann. Cas. 79; Ann. Cas. 1914 C 301. As to the right of an attorney to a contingent fee as affected by a settlement between client and adversary, see 18 Ann. Cas. 1115; and as to the effect on an attorney's lien of a collusive settlement after verdict, see Ann. Cas. 1913 E 646.

STATE OF INDIANA v. TUESBURG LAND
COMPANY ET AL.

[No. 8,794. Filed June 25, 1915. Rehearing denied February 4, 1916.
Transfer denied April 6, 1916.]

1. **QUIETING TITLE.**—*Actions.*—*Burden of Proof.*—The plaintiff in an action to quiet title has the burden to prove that it had title when the action was commenced and such burden is not discharged by proof that defendant has no title. p. 574.
2. **PUBLIC LANDS.**—*Title to Public Lands.*—The question of whether the title to lands belonging to the United States has passed from the government must be determined by the laws of the United States. p. 575.
3. **PUBLIC LANDS.**—*Swamp Lands.*—*Title of State.*—Title by the State to reclaimed lands without the meander lines described in the patent of the United States conveying swamp lands to the State, can not be supported on the theory that if marsh lands or non-navigable waters are included within the meander line of a government survey on which fractional lots abut, such marsh land or water inside the meander line will be considered to have been surveyed and the lines of the survey extended or protracted across the meandered territory so as to embrace a full subdivision so partially surveyed, and that hence a patentee of the government of such subdivisions or lots takes of the unsurveyed territory an amount sufficient to complete his subdivision. p. 576.
4. **WATERS AND WATERCOURSES.**—*Riparian Owners.*—*Boundaries.*—*Swamp Lands.*—A conveyance of land bounded by a nonnavigable stream carries with it the bed of the stream to the center, unless a contrary intention is manifest; but where land conveyed is described by a meander line run between such land and unsurveyed marsh or submerged land lying next to the stream, the title of the purchaser is limited to the land included within the survey. p. 581.
5. **PUBLIC LANDS.**—*Swamp Lands.*—*Acquisition of Title by State.*—A patent or at least a selection of land surveyed and the approval

of such selection by the Secretary of the Interior, is a necessary prerequisite to the State's acquisition of title to lands under the Federal Swamp Land Act. p. 582.

6. PUBLIC LANDS.—*Patents.*—*Construction.*—A patent usually conveys only land which has been surveyed, though in the case of patents issued under the Federal Swamp Land Act, where the land surveyed consists of fractional subdivisions or lots abutting unsurveyed submerged lands or marsh, the rule seems to be that the question of whether title to the unsurveyed territory passed from the United States by virtue of a patent of the surveyed land is dependent on the law of the State where the land is located. p. 583.
7. BOUNDARIES.—*Surveys.*—*Natural Monuments.*—Natural monuments will prevail as against other calls in survey. p. 587.
8. WATERS AND WATERCOURSES.—*Boundaries.*—*Meander Lines.*—As a general rule meander lines run in surveying fractional portions of the public lands along streams are merely for the purpose of defining the sinuosity of the banks and for ascertaining the quantity of land subject to sale, and are not to be considered as boundaries unless it appears that such was the intention of the parties to the instrument of conveyance. pp. 587, 588.
9. PUBLIC LANDS.—*Surveys.*—*Construction.*—Under the second section of the Act of Congress of 1796, providing that navigable rivers shall not be included in public surveys, though the question whether a given river is to be included in a survey is within the discretion of the surveyor, his decision is not conclusive. p. 588.
10. PUBLIC LANDS.—*Swamp Lands.*—*Title of State.*—*Extent.*—In view of the language of the Federal Swamp Land Act of 1850, and of the patents issued thereunder by the United States to the State, as well as of the plat describing the sections as abutting on a meander line purporting to be that of the Kankakee, a non-navigable river, rather than a boundary line between surveyed land, and unsurveyed submerged territory, all of which evidences the intention of the federal government to cede all the unsold swamp land in the State, the State acquired title to such unsurveyed submerged territory either by virtue of such patents, or under the doctrine of riparian ownership; the method of acquisition being dependent upon whether submerged land was considered as swamp land or as a portion of Kankakee River. p. 588.
11. PUBLIC LANDS.—*Swamp Lands.*—*State Patents.*—*Scope of Conveyances.*—Though the State acquired title to unsurveyed territory or marsh along the Kankakee River from the United States, it did not, in conveying to individuals under patents describing the land as described in the plats and patents of the United States, part with title to such submerged land, since such grants were made pursuant to the State Swamp Land Act of 1852 (1 Rev. Stat. 1876 p. 952), providing for the platting of swamp lands and their sale at a stipulated sum per acre, and that the proceeds were to be

used in paying for the sale of the lands, etc., and the grants, being statutory, are to be construed in view of the purposes and intention disclosed by such act. pp. 592, 594, 597, 604, 607.

12. **WATERS AND WATERCOURSES.—Meander Lines.—Boundaries.**—In determining whether the meander line of a stream should be regarded as a boundary beyond which a grantee may not claim title, the intention of the parties to the instrument, as gathered from the instrument itself, or if the instrument is ambiguous, as gathered in the light of facts and circumstances existing at the time the instrument was prepared, should always have an important if not a controlling influence. p. 592.
13. **BOUNDARIES.—Surveys.—Natural Monuments.**—The influential reason for the rule favoring natural monuments over other calls in a survey, rests on the presumed intention of the parties to convey the lands actually surveyed, and the presumption that natural monuments are less likely to be mistaken than other calls, and include and bound the lands so surveyed; but where the reason for the rule does not exist, the rule itself ceases. p. 593.
14. **PUBLIC LANDS.—Patents.—Construction.**—In interpreting a patent all contained in the patent must be considered, and the identity of the land ascertained by reasonable construction thereof, rejecting if necessary any erroneous call, and especially is this true where the survey was not actually run on the ground. pp. 597, 604, 607.
15. **BOUNDARIES.—Riparian Rights.—Meander Lines.**—The doctrine of riparian ownership applies only where the watercourse is in fact the boundary of the lands to which the doctrine is sought to be applied, and where there is uncertainty as to whether the meander line or the watercourse was intended as the boundary, in determining such question reference must be had to the conveyance to the party claiming the application of such doctrine and to the time of such conveyance, and not to a remote time or conveyance. p. 602.
16. **PUBLIC LANDS.—Swamp Lands.—Sale by State.—Authority of Officers.**—The officers of the State authorized to act for the State in the sale of its swamp lands, were as effectively bound and limited in their authority by the act of the legislature, as an agent of an individual would be, acting under the same express authority in writing, and persons purchasing through the agents of the State were charged with knowledge of the authority under which such agents acted. p. 606.
17. **COURTS.—Appellate Court.—Following Decisions of Supreme Court.**—Although a cause in the Appellate Court involves questions as to which there is apparent conflict in the decided cases of the Supreme Court, where the principle on which the opinion must be based has been given recognition in both the earlier and later of those decisions, as well as in those of the United States Supreme Court, the Appellate Court is not deprived of jurisdiction under

§1394 Burns 1914, Acts 1901 p. 565, but may follow those cases which it may deem to be supported by the better reason and authority. p. 607.

From Laporte Circuit Court; *James F. Gallaher*, Judge.

Action by the State of Indiana against the Tuesburg Land Company and others. From a judgment for defendants, the State appeals. *Reversed*.

Thomas M. Honan, Attorney-General, *Adam Wise* and *J. E. McCullough*, for the State.

Will R. Wood, *Grant Crumpacker*, *E. D. Crumpacker*, *Owen L. Crumpacker* and *Osborn, McVey & Osborn*, for appellees.

HOTTEL, J.—This is an appeal from a judgment against appellant, the State of Indiana, in an action wherein it is sought to quiet title to something over 3,700 acres of land situate in Laporte and Starke counties. The suit was filed in the Starke Circuit Court and a trial in that court resulted in a finding and judgment against the State. On separate motions made by appellant, a new trial as of right was granted and the cause was venued to the Laporte Circuit Court. A trial in that court resulted in the finding and judgment hereinafer indicated.

The complaint was in two paragraphs, each of which alleges that the appellant is the owner in fee simple of the real estate in controversy, and is in the usual form of a complaint to quiet title, the difference between the paragraphs being merely in the manner of describing the real estate. The real estate is all in township 33 north, range 3 west, and the subdivisions of the sections involved are described in the first paragraph of the com-

plaint as follows: (We do not repeat number of township and in other respects abbreviate description.) In Laporte County: All that part of the S. hf. of the SE. qr., sec. 3, lying E. of the meander line of the U. S. survey. All that part of the SE. qr., sec. 19, lying E. of the meander line of U. S. survey. In Starke County: All that part of the S. hf. of sec. 21, lying between the meander line of the U. S. survey on the E. and the old channel of the Kankakee River on the W. All that part of the N. hf. of sec. 21, lying E. of the old channel of the Kankakee River. All that part of the NE. qr. of the NW. qr. of sec. 28, lying west of the meander line of the U. S. survey (in both Laporte and Starke counties). All that part of sec. 10, lying E. of the meander line of the U. S. survey. All that part of sec. 16, lying E. of the meander line of the U. S. survey. All that part of sec. 20, lying E. of the meander line of the U. S. survey. All that part of sec. 29, lying W. of the meander line of the U. S. survey. All that part of the E. hf. of sec. 30, lying between the meander lines of the U. S. survey. All that part of the NE. qr. of sec. 31, lying between the meander lines of the U. S. survey.

The second paragraph describes the real estate in controversy by courses and distances, following what is indicated on the government plat (which plat hereinafter appears in this opinion) as the meander lines of the Kankakee River and including all the territory between such lines consisting of something over 5,500 acres and then excepting therefrom section 14, and so much of section 11 as lies within such boundaries, and in Starke County, and excepting also that part of section 16, within such boundaries and section 15, in Laporte County.

Appellees, Pinney and Biddle, hereinafter re-

ferred to as P. & B. filed a cross-complaint in four paragraphs. A demurrer filed by appellant to each paragraph of this cross-complaint was sustained as to the second and third paragraphs and overruled as to the first and fourth paragraphs. The first paragraph of cross-complaint was in the usual form to quiet title to all of sec. 21, in township 33 N., range 3 W., in Laporte and Starke counties, except the SE. qr., and the SE. qr. of the SW. qr. of said section.

For the reasons hereinafter indicated, it is not necessary that we set out the averments of said fourth paragraph further than to say that it seeks to reform the description of the real estate described in the letters patent issued by appellant to appellees, and to quiet title to the real estate included in the reformed description. A denial to each of the paragraphs of complaint and cross-complaint, by the respective defendants thereto, closed the issues.

Upon the issues thus formed there was a trial by the court, and a general finding as follows: "That the plaintiff is the owner in fee simple of all that portion of section 2, 11, 23, northeast quarter section 3, northeast quarter section 22, west half northwest quarter section 28, which lies within or between the meander lines of Kankakee River in said township and range, and is entitled to have its title quieted thereto; that the cross-complainants, Pinney and Biddle, are the owners in fee simple and should have their title quieted to all that portion of section 21, in said township and range, north and west of the thread of the Kankakee River, as the same was before the artificial straightening thereof; that as to all the other lands involved in the complaint the plaintiff is not the owner thereof." A motion for new trial filed by appellant was overruled and judgment

rendered in accord with the finding. The errors assigned and relied on for reversal by appellant are the rulings on its demurrer to the fourth paragraph of cross-complaint of appellees, P. & B., and the ruling on its motion for new trial.

Numerous questions relating to the admission of evidence are presented by appellant's motion for new trial, but the conclusion which we have reached on that ground of the motion which challenges the sufficiency of the evidence to sustain the decision of the trial court renders unimportant all other questions presented by the appeal, including that of the ruling on the demurrer to the fourth paragraph of P. & B.'s cross-complaint. We therefore go directly to a consideration of the question of the sufficiency of the evidence to sustain the decision of the trial court.

The appellant introduced in evidence the patent from the United States to the State for the lands in controversy, which is as follows:

"The United States of America. No. 2. To all to whom these presents shall come, greeting: Whereas, by the Act of Congress approved September 28th, 1850, entitled 'An Act to enable the State of Arkansas and other States to reclaim the "Swamp Lands" within their limits', it is provided that all the 'Swamp and Overflowed Lands', made unfit thereby for cultivation within the State of Indiana, which remained unsold at the passage of said Act, shall be granted to said State; and Whereas, in pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described have been selected as 'Swamp and Overflowed Lands', enuring to the said State, under the Act aforesaid, being situated in the District of Lands

subject to sale at Winamac, Indiana, to wit:” (We abbreviate and change the order of the descriptions.) Also W. hf. of SE. qr., the W. hf. NE. qr., the NE. qr. of NE. qr. and the W. hf. sec. 1, the E. hf. or lots Nos. 2, 3 and 4, the NW. qr. of the NE. qr., the E. hf. of NE. qr. and the E. hf. of the SE. qr. sec. 2. The W. hf. of NW. qr., the SE. qr. of the NW. qr. and the SW. qr. or the W. hf. of SW. qr. and lots Nos. 3 and 4 of sec. 3. The whole of secs. 4, 5, 6, 7, 8, 9, 12, 13, 17, 18, 24 and 32. The whole of fractional secs. 10, 11, 15, 20, 21, 22, 23, 28, 29, 30 and 31. The E. hf. of the SW. qr. of the SW. qr., the E. hf. of the NW. qr., NW. qr. of the NW. qr. and the E. hf. of SW. qr., sec. 19. The S. hf. SW. qr. the W. hf. SE. qr. and the N. hf., sec. 25. The NE. qr. of the SW. qr. and the N. hf., sec. 26. The N. hf. SE. qr. the SW. qr. and the N. hf., sec. 27. The N. hf. of the NE. qr. and the W. hf., sec. 38. The S. hf. of NW. qr., the N. hf. of SW. qr. and the NW. qr. of SE. qr., sec. 35. All in Tp. 33 N., R. 3 W., “containing in all fifteen thousand and eighty-three acres and eleven-hundredths of an acre, according to the Official Plats of Survey of the said lands returned to the General Land Office by the Surveyor General. And for which the Governor of the said State of Indiana did on the eighteenth day of December, one thousand eight hundred and fifty-two request a patent to be issued to the said State, as required in the aforesaid Act. Now therefore, know ye, That the United States of America, in consideration of the premises, and in conformity with the Act of Congress aforesaid, have given and granted, and by these presents do give and grant, unto the said State of Indiana, in fee simple subject to the disposal of the Legislature thereof, the tracts of land above described. To have and to hold the same, together with all rights, privileges, immunities and appurtenances there-

to belonging, unto the said State of Indiana, in fee simple and to its assigns forever. In testimony whereof," etc.

Upon this evidence appellant rested its case. The appellees Tuesburg Land Company and Northern Trust Company, trustee, hereinafter referred to as T & N, then introduced in evidence numerous letters patent, twenty-seven in all, issued by the State to the several respective purchasers therein named, by which the State conveyed to such purchasers the marginal lots or surveyed subdivisions of the land outside of and abutting on what is indicated in the government plat as being the meander lines of the Kankakee River. Patent No. 23,440 is as follows:

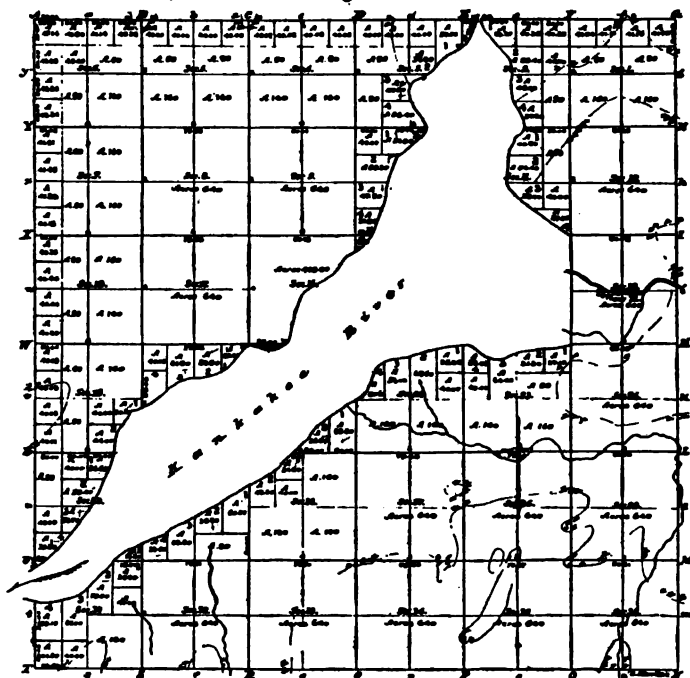
"The State of Indiana. No. 23,440. \$64.87 Letters Patent. To all to whom these Presents shall come, Greeting: Whereas, George H. Birch has filed, with the Secretary of State of the State aforesaid, the Certificate of the Auditor of State, whereby it appears that full payment has been made according to the provisions of an Act of the General Assembly of the State of Indiana, approved May 29, 1852, entitled 'An Act to regulate the Sale of the Swamp Lands donated by the United States to the State of Indiana, and to provide for the draining and reclaiming thereof, in accordance with the condition of said grant,' and also of the several Acts supplemental thereto, for the Lot No. One in the North West quarter of Section number Ten in Township number Thirty-three North, of Range number three West, containing Fifty one 90-100 acres, be the same more or less, situate in LaPorte County, where said lands were offered for sale. Now know ye, That the State of Indiana, for and in consideration of the sum of Sixty four 87-100 Dollars paid as aforesaid, as appears by Certificate number 23,440, has given,

granted, bargained and sold, and by these presents does give, grant, bargain and sell, unto the said George H. Birch and to his heirs and assigns, the said tract above described, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereto belonging to have and to hold the same forever. In testimony whereof," etc.

All the other patents are in form the same, except No. 54, which differs from the others in the manner of descriptions, viz., It describes the land by lot number, as follows: "Lot number 2 in section twenty-one (21), and lot number one (1) in section twenty-eight (28)", etc. These several patents show that each was made in accord with the description shown on the government plat, and also show that the State has conveyed the marginal lots or fractional subdivisions shown on such plat to abut on the Kankakee River, in so far as the finding of the trial court was against the State. In other words, in so far as the finding of the trial court was against appellant, it had, by said several patents, conveyed the marginal lots or subdivisions shown on such plat as being adjacent to and abutting on the Kankakee River.

The plat of the government survey of said township 33, on file in the State auditor's office, before referred to herein, was introduced in evidence by appellees. Appellant has filed with its brief a copy of this plat which we appropriate and make a part of this opinion, which plat is as follows:

Township N° 33 N. Range N° 3 W. E. 2d Mer.



Surveyed to S.W. by Charles H. Smith, Deputy Surveyor

The original field notes on file in the state auditor's office from which the plat was made were offered, and over appellant's objection and exception, were admitted and read in evidence. These notes describe the character of the land in the different subdivisions of the territory outside of the meander lines, in the following words: "Nearly all marsh," "slough", "land covered with ice", "land all ice", "land a lake of ice", "all floating muck", "land a miserable floating marsh", "land all marsh or deep water", "land beggars description", "this town is not worth describing". It should also be stated that wherever, in the field notes, reference is made to the territory indicated on the government plat as "Kankakee River" it is always designated as "river" or "Kankakee River". Every section line indicated on said government plat, when referred to in the field notes as running from an established corner in any direction to a point where there is no established corner, is made to terminate at a point designated as being on the right or left bank of the "Kankakee River".

Appellees also introduced in evidence plats of said township 33 on file in the office of the auditor of Laporte County, and a like plat on file in the auditor's office in Starke County. These plats show the lands in controversy, and the lots and subdivisions of sections abutting on the meander line of the Kankakee River substantially as shown by the government survey.

The cross-complainants, P. & B. introduced in evidence the following certificates of which we indicate parts only: (1) A certificate of the auditor of state as to the correctness of the record of the following description of lands recorded in tract books in the State auditor's office, viz.,

fraction in the NW. corner of section 21, in township 33 north, of range 3 west, containing nine (9) and eighty-hundredths of an acre, patented to William B. Biddle and William E. Pinney, April 4, 1874, No. 24,636, vol. 54, page 356, Laporte County. Lot 1 in the SE. qr. of section 21, in township 33 north, of range 3 west, containing 65.60 acres, patented to A. G. W. Sherman, July 16, 1871, No. 24,401, page 119, Starke County. Lot No. 2 in the SE. qr. of section 21, in township 33 north, of range 3 west, containing 36.80 acres, patented to Edward Hawkins, November 25, 1884, No. 54, vol. X, page 54, sold under act of 1883, Starke County. (2) Copies of certificates of sales of swamp land, issued by the treasurer of Laporte County during the ninety days ending March 27, 1874. Treasurer's office, etc. "Received of William B. Biddle and William E. Pinney, of Laporte County, in the State of Indiana, the sum of twelve dollars and twenty-five cents, being the purchase money for the fractional part of section No. twenty-one (21) north and west of the Kankakee River, in township No. thirty-three (33) north, of range three (3) west, containing nine (9) and (80) hundredths of an acre, more or less which entitles the said William B. Biddle and William E. Pinney to a deed from the State of Indiana for said land on presentation of this certificate to said treasurer. G. W. Mecum, treasurer of Laporte County." No. 24,637. Treasurer's Office, etc. "Received of William E. Pinney of Laporte County in the State of Indiana the sum of eight dollars and sixty cents, being the purchase money for the fractional part of section No. fifteen (15) north and west of the Kankakee river, in township No. thirty-three (33) north, of range three (3) west, containing six (6) acres and ninety (90) hun-

dredths of an acre more or less, which entitles," etc. Here follows the respective certificates of the treasurer and auditor of Laporte County and of the auditor of state, certifying to the correctness of the above, which we need not set out.

P. & B. also offered and read in evidence their patent from the State which is as follows:

"No. 24,636. \$12.25. The State of Indiana. Letters Patent. To all to whom these presents shall come, Greeting: Whereas, William B. Biddle and William E. Pinney have filed with the Secretary of State of the State aforesaid, the Certificate of the Auditor of State, *whereby it appears that full payment has been made according to the provisions of an Act of the General Assembly of the State of Indiana, approved May 29th, 1852, entitled 'An Act to regulate the sale of the swamp lands donated by the United States to the State of Indiana, and to provide for the draining and reclaiming thereof, in accordance with the condition of said grant', and also of the several Acts supplemental thereto, for the fractional north west quarter of Section number Twenty one (21), in Township number Thirty three (33) north, of Range number three (3) West, containing Nine 80-100 acres, be the same more or less, situate in LaPorte County, where said lands were offered for sale. Now Know Ye, that the State of Indiana, for and in consideration of the sum of Twelve 25-100 Dollars, paid as aforesaid, as appears by Certificate number 24,636, has given, granted, bargained and sold, and by these presents does give, grant, bargain and sell, unto the said William B. Biddle and William E. Pinney, and to their heirs and assigns, the said tract above described, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereto belonging", etc.*

Appellees, T & N offered and read in evidence

a deed from the English Land Company to the Tuesburg Land Company, which for the purposes of this opinion need not be set out.

The oral testimony given in the case, briefly stated, was to the following effect: Pinney testified that he purchased the land for himself and Biddle; that he examined the plat on file in the auditor's office of Laporte County before his purchase; that he paid taxes on the land up to the time of the litigation; that he had the land surveyed to ascertain how much they might have under their purchase; that they rented the land to the English Land Company and did other acts of ownership, etc. Charles H. Tuesburg testified that, after receiving its deed from the English Land Company, the Tuesburg Land Company took possession thereunder and has ever since continued in possession of the lands described in its deed; that it made improvements on the land, cultivated a part, including some of the land within the meander lines; that it sold marsh hay and did other acts of ownership, including work of reclamation by ditching and cutting timber both outside and inside the meander lines of the Kankakee River; that the ditch constructed by the Kankakee Reclamation Company in 1903, 1904 and 1905 through the territory involved was simply a widening, deepening and straightening of the old channel of the Kankakee River cutting through the bends and furnishing an artificial channel for such river.

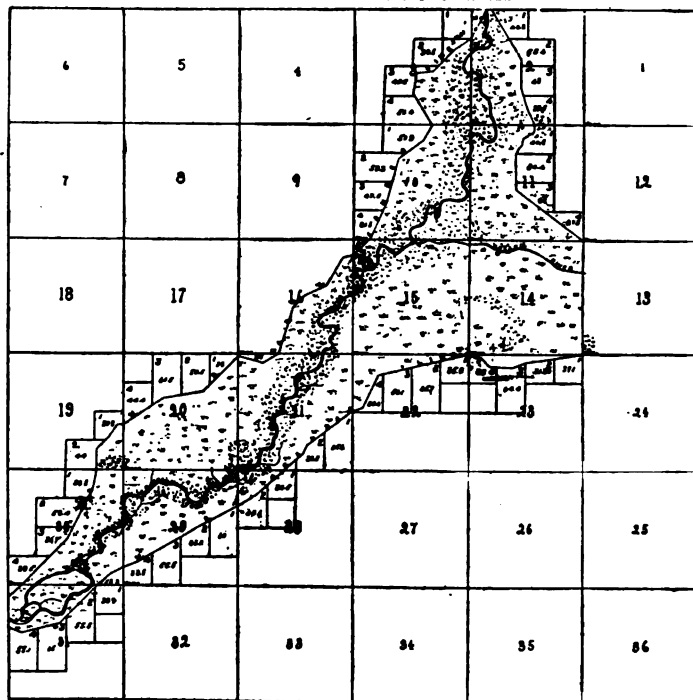
George D. Parks testified in rebuttal concerning a survey made by him in the year 1901, under the direction of Governor Durbin, by which he surveyed all the lands involved; that he did not run on the face of the ground, the meander lines as laid down by the government survey, but that

he ran the section lines and made notes from where those section lines crossed the meander lines and then in preparing the plat, from the government courses and distance of the survey made by Jeremiah Smith, he, Parks, platted on his plat the meander lines, checking it up with the notes he made in his survey; that he did not run along the meander lines; that, on both sides of the river, he ran all of the section lines that embraced any land in any section within the meander lines and platted on his plat the meander lines and their true location on each side of the river; that some of the notations which he made on the plat between the meander lines are technical marks that indicate where trees are located and where fresh marsh land exists; that the marsh land is indicated by short marks, three or four side by side and underlined with a short horizontal line; that the locations of trees are indicated by short broken curved lines; that the river had definitely defined banks; that when he made his survey there was along the banks, in places, a growth of ash, maple, elm, willow and sycamore timber; that the longest distance from the meander line to the channel of the river or banks that he noted was along the south lines of sections 14, 15 and 16, where the distance is about two miles and a quarter; that the nearest point is where the river crosses the north boundary line of the township; that he measured between the banks at that point when he made his survey and it was then 114 feet between the banks; that between the banks of the river proper and the meander line at the time he made his survey, beginning in section 2, the growth of trees was almost entirely on the west side of the river; that near the north half of the section there were but very few trees, but the south half of the sec-

tion, between the river and the section line, was all covered with trees; that this growth of trees extended into section 3 for several hundred feet; that there was a growth of trees in section 10 several hundred feet in width on the west side of the river, and between the section line and the river on the east side it was covered with trees; that there were some trees in section 11 on the east bank of the river, and the line between sections 10 and 11 ran through a forest all the way; that in section 21 there were trees growing upon both banks of the river, extending from a few feet to several hundred feet on either side; that there were a few trees in section 20, down in the southeast corner on the north bank of the river; that in section 29 there were a few trees on either side of the river; that in section 30, for a distance of a half mile along the river line, there were a few trees on either side; that the trees varied from the smallest timber in size up to (some few) trees as large perhaps as two feet in diameter, but the most of them were less than a foot in diameter; that the most of the larger trees had been cut off; that this was shown by the stumps; that some of the stumps would run as high as three feet in diameter, but many of them were from eighteen inches to two feet, and were mostly ash and maple, with some sycamore and a few black gum; that there was then no cultivated land between the meander lines except a little in section 14; that the rest of the growth, besides the trees mentioned, was marsh grass, cane brakes, rose briars, weeds and other grasses, that are usually found in a fresh marsh.

A copy of the plat of the survey made by Mr. Parks is set out in appellant's brief and we appropriate it and make it a part of this opinion. It is as follows:

TOWNSHIP 33 NORTH R. 3 W 14 PRIM MER



Appellant introduced a number of other witnesses who resided along the Kankakee River and who testified in rebuttal as to the location of the Kankakee River since they had known it, the character of its banks, the width of the stream within its banks, the extent of the wet and overflowed land outside of its banks, and between such banks, and the meander lines of such river as shown by the plat of the government survey before set out herein, the character of the vegetation and timber on such land, etc.

It is not necessary, however, to proceed further with the evidence. We have indicated enough thereof to show that the controlling facts in the case are not disputed. They are as follows: The lands conveyed by the United States patent involved in this suit are described as fractional sections, except as to sections 1, 2 and 3 where the portions conveyed are described as lots or other fractional subdivisions of a section. The patent by which the State obtained its title and the several patents through which it passed title, in terms convey nothing but surveyed lands, and describe surveyed lands only; that is to say, they describe only sections, fractional sections, lots or subdivisions of sections which have no existence independent of a survey. The acreage conveyed by the patent from the government corresponds to the acres contained in the surveyed lots and subdivisions and does not include the acreage in the unsurveyed or meandered territory. The land in dispute lies wholly within the boundary lines of what is designated on the government survey as "Kankakee River", and represents only that territory necessary to, and which does in fact complete the fractional sections and subdivisions thereof designated and indicated on said plat as sur-

vayed and as being bounded by the meander line of such river. In other words, the fractional sections bounded by the meander lines of the territory designated on such plat as "Kankakee River" are made fractional by reason of the meandering of such river; and, by extending the section, half-section and quarter-section lines, indicated on said plat, through the territory lying between the meander lines of said river such abutting fractional sections and subdivisions of sections will be perfected and completed. The State by its patent obtained title to all the fractional sections, lots and subdivisions of sections, indicated on said plat as actually surveyed and as being adjacent to the territory delimited by the meander lines of the Kankakee River. As shown by the plat, the lines of the survey were not actually run across the territory indicated on the plat as "Kankakee River", and consequently there was no attempt made at the time of such survey to subdivide into legal subdivisions the territory, whether land or water, included between the meander lines. On the contrary, the lines of survey were in fact run around the rim or edge of such territory and the fractional lots resulting from the meander lines were given numbers.

Do these facts uphold the finding and decision of the trial court before indicated? This being an action by the State to quiet its title to the

1. lands in controversy, the burden is on it to prove that it had title when it began this action. This burden can be discharged by proof of its own title and not by proof that the defendants have no title. §1103 Burns 1914, §1057 R. S. 1881; *Craig v. Bennett* (1897), 146 Ind. 574, 45 N. E. 792; *Blake v. Minker* (1894), 136 Ind. 418, 36 N. E. 346; *Graham v. Lunsford*

(1897), 149 Ind. 83, 48 N. E. 627; *Crotz v. A. R. Beck Lumber Co.* (1905), 34 Ind. App. 577, 585, 73 N. E. 273. It follows that our first inquiry should be whether the State ever obtained title to the land in dispute. As hereinbefore indicated, the State depends for its title on the patent issued to it by the United States government under the Swamp Land Act passed by Congress in 1850, and hence the determination of the question suggested requires us to determine whether the United States government by such act and its patent issued thereunder parted with title to the land in controversy. Under the great weight of authority the question, whether title to land which

2. was once the property of the United States government has passed from it, wherever presented, whether in a state or Federal court, must be determined by the laws of the United States. *Irvine v. Marshall* (1858), 20 How. 558, 15 L. Ed. 994, 999; *Wilcox v. Jackson* (1839), 13 Pet. *498, 10 L. Ed. 264, 273; *United States v. Gratiot* (1840), 14 Pet. *526, *537, 10 L. Ed. 573, 578; *Gibson v. Chouteau* (1872), 13 Wall. 92, 20 L. Ed. 534, 536; *Packer v. Bird* (1891), 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819; *Shively v. Bowlby* (1894), 152 U. S. 1, 34, 14 Sup. Ct. 548, 38 L. Ed. 331, 347; *St. Anthony Falls, etc., Co. v. Board, etc.* (1897), 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, 502; *Gutierrez v. Albuquerque Land, etc., Co.* (1903), 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588; *United States v. Rio Grande Dam, etc., Co.* (1899), 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, 1142; *Bagnell v. Broderick* (1839), 13 Pet. *436, 10 L. Ed. 235; Act of July 26, 1866 (14 Stat. at Large 253, Chap. 262); Act of March 3, 1877 (19 Stat. at Large 377, Chap. 107); Act of March 3, 1891 (26 Stat. at Large

1095, Chap. 561); Act of June 17, 1902 (32 Stat. at Large 388). However, there seems to be an exception to, or a departure from, this rule in the case of *Hardin v. Jordan* (1891), 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428; and *Mitchell v. Smale* (1891), 140 U. S. 406, 11 Sup. Ct. 819, 35 L. Ed. 442, the latter case being based on the former, and the case of *Kean v. Calumet Canal, etc., Co.* (1903), 190 U. S. 452, 23 Sup. Ct. 651, 47 L. Ed. 1134, to which cases we will have occasion to refer later in this opinion.

It is insisted by appellees, in effect: (1) that the lands involved, though shown on the government plat as lying within the meander lines

3. designated as "Kankakee River" were surveyed, and that, if surveyed, the marginal lots shown upon the plat to abut upon such river extend to the extreme boundaries of the sections and hence that the patents of the United States and of the State, by conveying the marginal lots or fractional sections and subdivisions thereof, necessarily included the abutting territory which was necessary to complete such fractional sections, or subdivisions thereof; (2) that, if such lands are in fact unsurveyed and the patent of the United States covers them (as is claimed by appellant), it does so by virtue of the common-law doctrine of riparian ownership, and hence that the patents issued by the State, by reason of the same doctrine, have deprived the State of its title. Upon the question first suggested, there are two lines of decisions of our Supreme Court, which may be divided as follows: (1) Those prior to *Stoner v. Rice* (1889), 121 Ind. 51, 22 N. E. 168, 6 L. R. A. 387, viz., *Ross v. Faust* (1876), 54 Ind. 471 23 Am. Rep. 655; *Ridgway v. Ludlow* (1877), 58 Ind. 248; *Edwards v. Ogle* (1881), 76 Ind. 302;

State v. Portsmouth Sav. Bank (1886), 106 Ind. 435, 459, 7 N. E. 379. (2) The case of *Stoner v. Rice* and those subsequent to it, viz., *Brophy v. Richeson* (1894), 137 Ind. 114, 36 N. E. 424; *Tolleston Club v. State* (1895), 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Kean v. Roby* (1896), 145 Ind. 221, 42 N. E. 1011; *Tolleston Club v. Clough* (1896), 146 Ind. 93, 43 N. E. 647; *Mason v. Calumet Canal, etc., Co.* (1898), 150 Ind. 699; *Gary Land Co. v. Griesel* (1913), 179 Ind. 204, 100 N. E. 673. Whether each of these cases in its class may be reconciled with the other cases of its class may be open to doubt, but that there is conflict between cases of the one class with cases of the other class seems certain.

A review of these decisions in so far as they affect the subject involved is well elucidated by Mr. Justice White in a very able dissenting opinion rendered by him in the case of *Kean v. Calumet Canal, etc., Co.*, *supra*. (Same case, *Mason v. Calumet Canal, etc., Co.*, *supra*.) An examination and careful study of his review of these cases and of his discussion and disposition of the same questions here involved will be enlightening and will at the same time disclose the difficulty of ascertaining from the decided cases any sure and correct guide to a determination of the questions presented by this appeal. In speaking of the holding of the Indiana Supreme Court in the case of *Kean v. Calumet Canal, etc., Co.*, *supra*, Justice White in such dissenting opinion said: "The court below held, although the United States survey had not, in fact, been extended beyond the meander line and the lots conveyed by the United States were described as fractional on the plat and in the patents, that the patentees yet took full sub-

divisions. The principle applied was this: Where marsh land or nonnavigable waters were within a meander line upon which fractional lots were abutted, the conveyance of such lots by the United States carries also the marsh land or nonnavigable water beyond the meander to the extent of a full subdivision. And, in order to accomplish this result, the marsh land and water inside of the meander will be considered to have been surveyed, and the lines of the survey be hence protracted across the meander so as to embrace a full subdivision. Whilst this theory was plainly irreconcilable with the construction given the United States law by the Supreme Court of Indiana in cases decided by it prior to *Stoner v. Rice*, *supra*, that case announced the rule, and the subsequent cases in Indiana have sanctioned it down to and including *Kean v. Roby*, *supra*, upon which the decision in this case was rested. In *Hardin v. Jordan*, *supra*, the doctrine of *Stoner v. Rice*, *supra*, was criticised as an unwarranted departure from the common law, and it was observed—as was undoubtedly the case—that the Indiana court, in *Stoner v. Rice*, *supra*, but adopted the rule announced by the Supreme Court of Michigan in *Clute v. Fisher* (1887), 65 Mich. 48, 31 N. W. 614, shortly before the decision in *Stoner v. Rice*, *supra*. Now, the opinion in *Clute v. Fisher*, *supra*, shows that the Michigan court in that case but followed a prior ruling made by it at the same term in, *Palmer v. Dodd* (1887), 64 Mich. 474, 31 N. W. 209. The latter case involved title to land within a section made fractional by a meandered lake or marsh, and the controversy turned upon whether, under the law of the United States, the rights of the owner of the fractional section extended beyond the me-

ander line. The Supreme Court of Michigan, in deciding the question, said: 'When the United States grants by patent land described by a legal subdivision, the grantee is entitled to all the land embraced within the legal subdivision contained in his grant, and is not limited by the number of acres specified in the patent or upon the government plat. The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain. But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson v. Hoffman* (1884), 54 Mich. 246, 20 N. W. 37; *Keyser v. Sutherland* (1886), 59 Mich. 455, 26 N. W. 865, which were based upon the decision of the Supreme Court of the United States in *Brown v. Clements* (1845), 3 How. *650, 11 L. Ed. 767'. It is, hence, apparent that the rule in *Clute v. Fisher, supra*, was based upon the construction of the law of the United States expounded by this court in *Brown v. Clements, supra*. But long prior to the decision in *Clute v. Fisher, supra*, this court, in *Gazzam v. Phillips* (1857), 20 How. 372, 15 L. Ed. 958, had reviewed the case of *Brown v. Clements, supra*, and decided that the sale of a fractional lot did not convey a full subdivision; and, in consequence of this view, the case of *Brown v. Clements, supra*, was expressly overruled. In subsequent cases in Michigan the fact that that court has mistakenly predicated its conclusion in *Clute v. Fisher, supra*, on a case which this court had overruled, has been conceded. *Grand Rapids Ice, etc., Co. v. South Grand Rapids Ice, etc., Co.* (1894),

102 Mich. 227, 60 N. W. 681, 25 L. R. A. 851. But, while the Michigan court has thus recognized the error into which it inadvertently fell in *Clute v. Fisher*, *supra*, the Indiana court has continued to apply that rule, although the sole authority upon which it rests has been repudiated."

It would seem therefore that the doctrine or rule declared in the case of *Stoner v. Rice*, *supra*, and followed in the later cases, to the effect that, where marsh land or nonnavigable waters are included within the meander line of a government survey on which fractional lots abut, such marsh land or water inside of the meander line will of considered to have been surveyed and the lines of the survey extended or protracted across the meandered territory so as to embrace a full subdivision so partially surveyed, and that a patentee of the government of such subdivisions or lots bordering on such meander line will be held to take of the unsurveyed territory an amount sufficient to complete and make full his subdivision, is now practically unsupported by authority in other jurisdictions. To us the principle seems not only to be without support of authority in other jurisdictions but we can see back of it no good reason for its existence, and it may, and must necessarily, in some cases, furnish the means of accomplishing a legal absurdity, as was demonstrated, we think, in the case of *Tolleston Club v. Clough*, *supra*, where the owner of the land would have been permitted to extend his lot or subdivision across the unsurveyed territory, and the meandered stream on which it abutted, and finished out his subdivision on the other side of such stream, but for the fact that he, in his pleadings, had limited his claim to the center of the stream.

There is, however, another rule of law which is

recognized by both appellant and appellees, and on which appellees insist that both the

4. State's title and their title may be upheld—viz., the doctrine of "riparian ownership".

Under this doctrine a grant or conveyance of land bounded by a nonnavigable stream carries with it the bed of the stream to its center, unless a contrary intention is manifest from the grant or conveyance itself. *Illyes v. White River Light, etc., Co.* (1911), 175 Ind. 118, 93 N. E. 670; *Irvin v. Crammond* (1915), 58 Ind. App. 540, 108 N. E. 539, and authorities cited. This doctrine was recognized at common law and is recognized and followed both by the Supreme Court of the United States and by the Supreme Court of this State. *Ross v. Faust, supra*; *Edwards v. Ogle, supra*; *Kean v. Roby, supra*; *John Hilt Lake Ice Co. v. Zahrt* (1902), 29 Ind. App. 476, 62 N. E. 509; *Brophy v. Richeson, supra*; *Illyes v. White River Light, etc., Co., supra*; *Kean v. Calumet Canal, etc., Co., supra*; *Sizor v. City of Logansport* (1898), 151 Ind. 626, 50 N. E. 377, 44 L. R. A. 814; *Knickerbocker Ice Co. v. Surprise* (1913), 53 Ind. App. 286, 97 N. E. 357, 99 N. E. 58; *Hardin v. Jordan, supra*; *Mitchell v. Smale, supra*; *Whitaker v. McBride* (1905), 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857. As hereinbefore indicated, the government plat shows that the meandered territory here involved was "Kankakee River". Such plat and the State's patent from the government show that the State has title from the government for all the fractional sections or subdivisions thereof abutting on the meander line of the river so meandered. It is not disputed that the Kankakee River is a nonnavigable river. It would follow therefore that the State by its patent, having obtained title to all the fractional

sections or subdivisions thereof bordering on such river under the doctrine of riparian ownership, would take title to the center of such stream and this would necessarily include all the land here involved. However, such taking by the State, under the law, would be predicated on the theory that there was a survey of the lands so selected by it under such act and that the natural monument, the river, was in fact the boundary of the several fractional sections, or subdivisions, indicated as abutting thereon. If the meander line, in fact, merely marked the boundary between surveyed and unsurveyed territory, it seems that under the weight of authority, the doctrine of riparian ownership would have no application, but the purchaser of the surveyed territory would be limited to that included within the survey. The weight of authority seems to be to the effect that a patent is also a necessary prerequisite to the State's acquiring title to lands under the Swamp Land Act. *Tol-*

5. *leston Club v. State, supra; Niles v. Cedar Point Club* (1889), 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, 174; *Brown v. Hitchcock* (1899), 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Rogers, etc., Mach. Wks. v. American Emigrant Co.* (1896), 164 U. S. 559, 574, 17 Sup. Ct. 188, 41 L. Ed. 552, 558; *Michigan Land, etc., Co. v. Rust* (1897), 168 U. S. 589, 592, 18 Sup. Ct. 208, 42 L. Ed. 591, 592; *Little v. Williams* (1913), 231 U. S. 335, 339, 340, 34 Sup. Ct. 68, 58 L. Ed. 256, 259. The Supreme Court in this State in some of its earlier cases announced a different doctrine, viz., that the acts of Congress upon the subject of swamp lands, by their own force, conveyed the title to such lands to the State. *Edmondson v. Corn* (1878), 62 Ind. 17, 21; *Matthews v. Goodrich* (1885), 102 Ind. 557, 564, 568, 1 N. E. 175; *State v. Portsmouth Sav. Bank,*

supra; *Tolleston Club v. State, supra*. However, in the case of *Tolleston Club v. State, supra*, the Supreme Court, in an opinion on petition for rehearing seems to have recognized such rule to be as first indicated, or at least, holds that there must be a survey of such lands and a selection thereof by the State and an approval of such selection by the Secretary of the Interior. It has also been

6. frequently declared by the Supreme Court of the United States that a patent conveys only land which has been surveyed. *Horne v. Smith* (1895), 159 U. S. 40, 44, 45, 15 Sup. Ct. 988, 40 L. Ed. 68, 70; *West v. Cochran* (1855), 17 How. 403, 407, 15 L. Ed. 110, 113; *Security Land, etc., Co. v. Burns* (1904), 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662, 668; *M'Ivers v. Walker* (1815), 9 Cranch *173, 3 L. Ed. 694; *Niles v. Cedar Point Club, supra*; *French-Glenn Live Stock Co. v. Springer* (1902), 185 U. S. 47, 52, 22 Sup. Ct. 563, 46 L. Ed. 800, 802; *Kean v. Calumet Canal, etc., Co., supra*, 498. It will be seen from what we have already said and from an examination of the authorities cited, that the question under consideration is not free from difficulty and that there are many decided cases which seem to indicate that the title to the land in controversy still remains in the United States government. However, in the case of *Hardin v. Jordan, supra*, 379, where the Supreme Court of the United States was "called upon to decide whether the title of the plaintiff, under the patent title granted to her ancestor in 1841 extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to line of low-water mark, as held by the court below", such court held, in effect, that: (1) Meander lines along or near

the margin of a stream or other body of water are run to ascertain the quantity of public land sold and are not boundary lines; the waters themselves constitute the real boundary. (3) Grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. (4) The common law is the law of Illinois as to the rights of riparian owners. (5) By the common law, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad filum aquae*. This case is approved and followed in the case of *Mitchell v. Smale, supra*.

In the more recent case of *Kean v. Calumet Canal, etc., Co., supra*, decided by the Supreme Court of Indiana (*Mason v. Calumet Canal, etc., Co., supra*), and taken to the Supreme Court of the United States by writ of error, the latter court again approved and followed the case of *Hardin v. Jordan, supra*, and *Mitchell v. Smale, supra*, and in doing so, said: "For twelve years the decisions in *Hardin v. Jordan* and *Mitchell v. Smale* have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown. Meantime many titles must have passed on the faith of those decisions. The United States can meet them by the form of its conveyances. It seems to us that it would be likely to do more harm than good to allow them to be called in question now. It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field notes that the sections and divid-

ing lines were clearly marked off and posts set. The case is similar to *Kean v. Roby* [1896], 145 Ind. 221, 42 N. E. 1011, where the survey was pronounced sufficient. No difficulty was felt on the ground that the survey did not cover the submerged land in *Hardin v. Jordan*, *supra*. But furthermore, the land was selected as 'swamp and overflowed lands' by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so it was confirmed to the State by the act of March 3, 1857, Chap. 117, 11 Stat. at Large 251, Rev. Stat. §§2484 [U. S. Comp. Stat. 1901, p. 1588]. The confirmation encounters none of the difficulties of cases like *Stoneroad v. Stoneroad* [1895], 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966. The land surrounding the water, at least, was surveyed, so that the identification of the submerged portion was absolute. We are of opinion that the State of Indiana got a title to the whole land in dispute." (Our italics.)

It is proper in this connection to say that the three cases just cited are criticised and disapproved in a very able and exhaustive dissenting opinion written by Justice White and concurred in by Justice McKenna, in the case of *Kean v. Calumet Canal, etc., Co.*, *supra*. It was in this opinion that the Indiana cases were reviewed and criticised as hereinbefore indicated. The case of *Hardin v. Jordan*, *supra*, and the other cases which follow it are especially criticised, because they seem to announce the doctrine that in such cases the question whether title to the land passed from the United States government should be determined by the law of the State where the land was located. It seems, however, that in *Hardin v. Jordan*, *supra*, all the members of the court did

not take the view that the opinion in that case declared the rule to be as broad as the interpretation given to it by Justice White. This appears from a dissenting opinion by Justice Brewer, joined in by Justice Gray and Justice Brown, in the case of *Hardin v. Jordan*, *supra*, 402, in which the following language is found: "Beyond all dispute the settled law of this court, established by repeated decisions, is that *the question how far the title of a riparian owner extends is one of local law.*" (Our italics.) Justice Brewer's opinion then proceeds with a discussion of the laws of Illinois and concludes that the law as announced and applied to the facts of the case by the lower court was correct. It seems, therefore, that, in *Hardin v. Jordan*, *supra*, some members of the court, at least, did not understand that such court was, in that case, announcing the broad doctrine, that in determining the question whether title to lands once owned by the government was passed by its patent, reference should be had to the local law rather than the law of the United States.

Going back to the dissenting opinion of Justice White in the case of *Kean v. Calumet Canal, etc., Co.*, *supra*, we feel it proper to say that he, in a very thorough and exhaustive discussion of the question involved, each phase of which is supported by numerous authorities, to our minds, greatly weakens the force of the majority opinion and makes a strong showing to the effect that territory included between meander lines, as in the case there involved and here involved, should be treated as unsurveyed; that the meander line in such case is a boundary line marking the extent of the surveyed territory and that a patent from the government conveying the fractional sections or subdivisions of land abutting on such meander

line conveys the surveyed territory only. However, the majority opinion in that case is now the law of the United States Supreme Court on the question involved and even though it may apparently be out of harmony with former cases of that court, we believe that in its application to the Swamp Land Act, especially when applied to the facts of a case like the one here presented, it follows both law and equity.

It may be and indeed we think it must be conceded that the territory marked "Kankakee River" on the government plat was not *actually surveyed*. It does not follow, however, that the meander line, rather than the river was intended as the boundary of the surveyed territory. The rule in

7. favor of natural monuments as against other calls in a survey is universal. *Illyes v. White River Light, etc., Co.*, *supra*; *Emmons v. Kiger* (1864), 23 Ind. 483, 486; *Allen v. Kersey* (1885), 104 Ind. 1, 4, 3 N. E. 557; *Pierce v. Vansell* (1905), 35 Ind. App. 525, 535, 74 N. E. 554; *Preston v. Bowmar* (1821), 6 Wheat. *582, 5 L. Ed. 336; *Brown v. Huger* (1859), 21 How. 305, 318, 16 L. Ed. 125, 129; *Higuera v. United States* (1865), 5 Wall. 827, 835, 18 L. Ed. 469, 471; *St. Clair County v. Lovington* (1874), 23 Wall. 46, 62, 23 L. Ed. 59, 61; *Security Land, etc., Co. v. Burns*, *supra*, and cases cited. Generally speaking, "meander lines are run in surveying fractional

8. portions of the public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. * * * Proprietors bordering on streams not navigable, unless re-

stricted by the terms of their grant, hold to the center of the stream." *Sizor v. City of Logansport* (1898), 151 Ind. 626, 627, 628, 50 N. E. 377, 44 L. R. A. 814, and cases cited. See, also, *Tolleston Club v. State*, *supra*; *Tolleston Club v. Clough*, *supra*; *Kean v. Roby*, *supra*; *Mason v. Calumet Canal, etc., Co.*, *supra*; *Gary Land Co. v. Griesel*, *supra*; *Brophy v. Richeson*, *supra*; *Stoner v. Rice*, *supra*; *Sphung v. Moore* (1889), 120 Ind. 352, 22 N. E. 319; *Ross v. Faust*, *supra*; *Ridgway v. Ludlow*, *supra*; *Hardin v. Jordan*, *supra*; *Mitchell v. Smale*, *supra*; *Whitaker v. McBride*, *supra*; *St. Paul, etc., R. Co. v. Schurmeier* (1869), 7 Wall. 272, 19 L. Ed. 74. "The second section of the

Act of Congress of 1796 provides that nav-

9. igationable rivers shall not be included in public surveys; but does not indicate what shall be considered such; and it is left to the discretion of the surveyor to include a given river or not. But of course his decision can not be conclusive." *Ross v. Faust*, *supra*, 475. While a meander line

may be and frequently is treated as a boundary line yet this is done only when it appears that it was the intent of the parties to the instrument of conveyance, that it should be so treated. *Sizor v. City of Logansport*, *supra*; 4 R. C. L. 97; *Irvin v. Crammond*, *supra*; *Horne v. Smith*, *supra*.

In the instant case no such intent appears, as between the government and the State. On the contrary, the facts all justify, if they do

10. not compel, the inference that the stream and not the meander line should be treated as the boundary. We say this because it appears from the Act of Congress pursuant to which the patent of the United States government was issued, and to which reference was had in the patent, that

it was the purpose and intent of Congress "*that all the 'swamp and overflowed lands' made unfit thereby for cultivation within the State of Indiana which remained unsold at the passage of said act shall be granted to said State.*" (Our italics.) To carry out this purpose, Congress in said act provided that, as soon after its passage as practicable, it should be the duty of the Secretary of the Interior "to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State * * *. And at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State * * * subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid. * * * That in making out a list and plats of the land aforesaid, *all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it, shall be excluded therefrom.*" (Our italics.) 9 Stat. at Large 519, Chap. 83.

To enable the State to select and indicate the swamp lands to be granted to it under such act, the Department of the Interior was by such act authorized to make out plats of such lands to be furnished the State for its selection. Pursuant to this authority, the plat of the government survey was made in 1834 and 1835 and set out in this opinion was adopted by the *general land office of the United States and furnished to the State as being*

a plat from which it might indicate and select "all the swamp and overflowed lands made unfit for cultivation then unsold within the State. From such plat the State, as shown by its patent from the government, reported its selections to the 'general land office of the United States.' The plat, thus adopted by the government and furnished to the State, from which it made its selections of such lands designated the strip of territory between the meander lines indicated on such plat as 'Kankakee River.' "

Such territory was either swamp land or it was what such plat showed it to be, viz., "Kankakee River." If it was swamp land, it is manifest that under the Act of Congress it was the intention of the government to give it to the State, and it is equally certain that the land surrounding the water (or meandered territory) at least was all surveyed so that the identification of the submerged territory was absolute and the State did all it could to indicate its intention to select and take such territory because it indicated and selected *all* of such surveyed territory, viz., *all* of the abutting fractional sections and subdivisions thereof. On the other hand, if the meander line should in fact be treated as the government plat indicates it should be treated, that is to say, if the Kankakee River should be treated as the boundary of the lands selected by the State, then the State takes the territory within the meander lines under the doctrine of riparian ownership. The selection of land by the State and the issuing of its patent pursuant thereto under the act in question is therefore easily distinguishable from the cases involving a patent from the government to an individual where there was a sale at so much per acre, and the meander line was one of the lines which bounded

and circumscribed the number of acres for which the patent was issued. The instant case has the further advantage over the case of *Hardin v. Jordan*, *supra*, in that the territory between the meander lines is designated as "Kankakee River," while the territory involved in that case was designated as "lake" or "marsh". Such river being nonnavigable, no question can exist as to the application of the doctrine of riparian ownership, while some jurisdictions have refused to apply this doctrine to inland lakes or ponds which have no current. *Trustees of Schools v. Schroll* (1887), 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; *Hardin v. Jordan*, *supra*; *City of St. Louis v. Myers* (1885), 113 U. S. 566, 5 Sup. Ct. 640, 28 L. Ed. 1131; *Webber v. Pere Marquette Boom Co.* (1886), 62 Mich. 626, 30 N. W. 469; *State v. Milk* (1882), 11 Fed. 389; *Wheeler v. Spinola* (1873), 54 N. Y. 377, 385; *State v. Portsmouth Sav. Bank*, *supra*. The instant case has the further fact in its favor that, so far as the evidence shows, the United States has never issued any patent to the land involved, other than that issued to the State and has never made any additional survey of such territory or made any claim thereto. Congress, by the act in question, having authorized the giving of *all* said land, and the officers of the government, under the authority of such act, having furnished to the State a plat which was treated both by the United States and the State as being sufficient for its selection of *all* of such lands, and which is open to an interpretation that will make it sufficient for such purpose, it is the duty of the court to adopt such interpretation. Such considerations doubtless had their influence in the decision of *Hardin v. Jordan*, *supra*, and the cases following that decision. The language of

the Supreme Court of the United States in the case of *Kean v. Calumet Canal, etc., Co.*, above quoted, is specially applicable to the facts of this case. For the reasons indicated and on the authorities, *supra*, we hold that title to the land in question passed from the United States government to the State of Indiana.

We next inquire whether the State has parted with its title to this land. In this connection, it is very earnestly insisted by appellees that a

holding that the State acquired title under

11. its patent to the lands in dispute necessitates a holding that it has passed or conferred title to its respective patentees, because it adopted the government survey and plat and in its patents conveyed with reference to such survey and plat, and by the same description that it received title; that the State should not be permitted to say that, when it took the land from the United States government, the meander line of the Kankakee River as designated on the plat of the survey made by such government was in fact the bank or meander line of such river and was not a boundary, and then, when the State sold such land under the same plat and description be heard to say that such meander line was no longer a meander line of the river, but was in fact a boundary line, and limited the lands sold by the State within such boundary. Upon first impression this argument seems conclusive, but, Will it bear analysis? As before indicated, in this opinion, the general rule is that the meander line of a watercourse is not treated as a boundary line but, instead, the watercourse is treated as the boundary. However, in determining

12. whether such meander line should be treated as a natural monument marking the bank

of the stream which it is supposed to meander, or as a boundary line beyond which the grantee may not claim title, the intention of the parties to the instrument should always have an important, if not a controlling influence. Such intention must ordinarily be ascertained from the instrument itself, but, where uncertainty exists from the instrument, resort may be had to other proper methods to ascertain such intent. In other words, if a contract is open to two constructions, or if there be uncertainty or ambiguity in its language, such contract should be interpreted, if possible, in the light of the facts and circumstances which existed and were present and of influence at the time the instrument was prepared and executed, and the intent of the parties, when so ascertained should, if possible be carried out. *Guaranty Sav. etc., Assn. v. Rutan* (1893), 6 Ind. App. 83, 33 N. E. 210; *Reissner v. Oxley* (1881), 80 Ind. 580; *Chicago, etc., R. Co. v. Barnes* (1888), 116 Ind. 126, 17 N. E. 459; *H. G. Olds Wagon Works v. Coombs* (1890), 124 Ind. 62, 24 N. E. 589; *Manhattan Oil Co. v. Carrell* (1905), 164 Ind. 526, 73 N. E. 1084.

The important and influential reason for the

13. existence of the rule which gives a natural monument favor over other calls in a survey is because it is presumed to be the intention of the parties to the grant to convey the lands actually surveyed, and natural monuments when called for are supposed to include and bound the lands so surveyed and the presumption is that such monuments are less likely to be mistaken than are other calls in the survey. *M'Ivers v. Walker, supra*; *Security Land, etc., Co. v. Burns, supra*; *White v. Luning* (1876), 93 U. S. 514, 23 L. Ed. 938, 940; *Davis v. Rainsford* (1821), 17 Mass. 207;

4. R. C. L. 101, §35. The undisputed facts in this case show that, as between the State and its patentees, said reason does not exist for favoring the natural monument rather than the meander line as the true boundary of the lands granted to the State's patentees. When the reason for a rule ceases, the rule itself ceases.

We have already indicated in this opinion that we thought it was the clear intent of the government to pass and the State to accept all the

11. swamp lands in the State and, to accomplish that purpose, we concluded that, as between the government and the State, it was the duty of the court to treat the watercourse meander line as the true boundary of the lands selected by the State under such Swamp Land Act. We now inquire, What was the intent between the State and its patentees as shown by the patents and by the act of the legislature pursuant to which such patents were issued, reference being made in such patents to the acts of the legislature as the authority under which they were issued?

The act under which the lands in question were sold by the State was the Swamp Land Act of January 27, 1852 (1 R. S. 1852 p. 471), entitled an "Act to *regulate* the sale of swamp lands donated by the United States to the State of Indiana, and to *provide for* the draining and reclaiming thereof in accord with the conditions of said grant." The act constitutes the county auditor and county treasurer as agents to sell such lands and provides that the auditor of state shall cause to be prepared plats of all such lands and forward the same to the respective auditors of the counties; that "each tract of land so offered for sale shall be struck off to the highest bidder therefor, for any sum *not less than one dollar and twenty-five cents for each acre in*

the tract"; that the auditor shall give to the purchaser a brief certificate stating the name of the purchaser, *the tract or tracts purchased by him, the number of acres contained in such tract or tracts, and the price per acre at which the same was sold*; that the certificate holders shall present the certificate to the treasurer, pay him the whole amount of the purchase money, and that the treasurer shall give to the purchaser a duplicate receipt, "specifying therein the date of the receipt of the money, the name of the purchaser, *the amount paid for each acre, the number of acres in the tract or tracts, the county, congressional township, range and section in which the tract or tracts are situated*"; that the county auditor shall enter in a book, kept by him for that purpose, "a brief description of each tract of land purchased, *the number of acres contained therein, the price paid for each acre, the name of the purchaser or purchasers, and the date of the purchase*"; that the treasurer shall forward to the auditor of state a certified copy of the record of certificates issued by him to purchasers; that the auditor of state shall prepare the deeds to the purchaser *upon the receipt of the returns from the treasurers*, and that the deeds shall be signed by the governor and attested by the secretary of state; *that the moneys received shall constitute a special fund to be used in paying expenses of selecting, platting, and selling lands, expense of reclaiming the land by ditching or dyking, and the balance "shall constitute a portion of and belong to the common school fund of the State as in the Constitution provided"*; *the unsold lands were made "subject to entry at the sum of one dollar and twenty-five cents the acre."* (Our italics.)

Under this act, there was imposed on the agents of the State, the duty of surveying and ascer-

taining the number of acres in each tract sold. This was a prerequisite to the sale and the authority of the agents to sell was thereby limited. The whole tenor and theory of the act is that the number of acres to be sold to each purchaser should be ascertained and paid for at the rate of not less than \$1.25 an acre, and that when a report of such sale was made the purchaser should receive his deed and the fund so raised should be used to pay the expenses of selecting, *platting* and selling lands and expenses of reclaiming, etc. Can it be said that under such act the agents of the State were authorized to convey to any purchaser more than the ascertained acreage in his lot; or, that such purchaser had any right to suppose that he was getting more than he paid for; or, that the State, would, for example, take the \$12.25 paid by P. & B. for the 9.80-acre tract and after paying the proportion of expenses of sale allotted to such tract, apply enough of the balance of the \$12.25 towards redeeming 240 acres more for the benefit of P. & B. and then turn the balance into the school fund? In this connection it seems appropriate to ask, What would the school fund get? All of the provisions of this act indicate that it was the intent of the legislature that the lines of survey used or adopted by the State for the purpose of identifying and bounding the tracts sold to the State's patentees should mark and circumscribe the number of acres sold to each purchaser and hence that all of such lines, whatever they may have been shown to be on the plats, so made or adopted for such sale should be treated as boundary lines. The government plat, adopted by the State in making its sales to its patentees shows that the territory between the meander lines, marked "Kankakee River," was not actu-

ally surveyed; that all of the lots bordering on such meander lines were surveyed and that the line bounding such abutting lots including such meander line, enclosed the number of acres indicated as being in such lots. The agents of the State by adopting such survey, in so far as it showed surveyed lots with the boundaries necessary to include and mark the acres indicated in each lot to be sold, would be strictly within the spirit and letter of the authority under which they were acting; but an adoption of the survey with the idea that a watercourse which in no way fixed or determined acreage in any tract sold should mark the true boundary of any such tracts would have been in violation of such authority. Being purely statutory, grants of public lands should be scrutinized and construed by the courts with reference to the statutes and the statutes must be given their true interpretation and force. *Kean v. Calumet Canal, etc., Co., supra*, and cases cited; *Security Land, etc., Co. v. Burns, supra*, and cases cited; *Tolleston Club v. Lindgren* (1907), 39 Ind. App. 448, 451, 452, 77 N. E. 818; *State v. Portsmouth Sav. Bank, supra*. In interpreting a patent, all contained in the patent must be con-

14. sidered, and the identity of the land ascertained by a reasonable construction thereof, rejecting if necessary any erroneous call. *Kean v. Calumet Canal, etc., Co., supra*, and cases cited. Especially is this true where a survey was not actually run on the ground. *Platt v. Vermillion* (1900), 99 Fed. 356, 39 C. C. A. 555.

In discussing the subject under consideration, the Supreme Court, in the case of *Brophy v. Richeson, supra*, said: "If the boundaries were un-

certain 'the number of acres, according
11. to the survey' would certainly be an indication as to the location of the true boun-

dary line within which those acres were contained, especially in a case like this, where there is no dispute as to the boundary except as to one side." See also, *Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.* (1914), 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564, 568, and cases cited.

In the case of *Niles v. Cedar Point Club*, *supra*, 306, the court said: "It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale."

The authorities which appellees cite and rely on as fixing the river as the boundary rather than the meander line all recognize that the purpose of a meander line is *to ascertain the number of acres in the fractional section subject to sale and for which the government charged a consideration*. Such was the only purpose to be served by the survey required by the act of the legislature in this case. The meander lines, with the other unquestioned lines of the survey indicated on the government plat, accurately and correctly measured the number of acres in each tract sold by the State, and they did not and could not, within the letter and spirit of the act of the legislature, correctly, serve any other purpose.

In the case of the *State v. Portsmouth Sav. Bank*, *supra*, the Supreme Court in discussing the authority of the officers of the State in the matter of

the sale of its swamp lands under the act of the legislature here involved, said: "Public officers have no authority to dispose of the State's lands except such as is conferred upon them by positive statute. Any sales of such lands by them without such statutory authority are void as against the State, unless they are in some proper way ratified by the State. *McCaslin v. State, ex rel.* [1885], 99 Ind. 428; *Brown v. Ogg* [1882], 85 Ind. 234; *Vail v. McKernan* [1863], 21 Ind. 421; *Skelton v. Bliss* [1855], 7 Ind. 77; *Ferris v. Cravens* [1879], 65 Ind. 262; *Whiteside v. United States* [1876], 93 U. S. 247 [23 L. Ed. 882]; *Hull & Argalls v. Marshall County* [1861], 12 Iowa 142. * * *

The border lands were in a condition to be sold, and the officers had authority to sell them. The bed of the lake was not in a condition to be sold, and hence they had no authority to dispose of it directly or indirectly. Of this lack of authority, Dunn and Condit were bound to take notice. They were bound to take notice of the public records and statutes. Those lands could not have been given away by the officers to the detriment of the school fund, and in violation of the object of the grant. Neither could they be disposed of in any way, except in pursuance of law. The State held the swamp lands in trust for the people, and the object for which they were granted. Its grants of such lands therefore, are to be construed strictly. *Wilcoxon v. McGhee* [1851], 12 Ill. 381, 54 Am. Dec. 409; *McManus v. Carmichael* [1856], 3 Iowa 1; *City of Terre Haute v. Terre Haute Water Works Co.* [1884], 94 Ind. 305. To grant the contention of appellee would be to hold that a grantee from the State of a forty-acre tract of overflowed and swamp land, bordering upon a lake four miles in width, would take by the State's deed, not

only the forty acres, but in addition a strip of land as wide as the forty-acre tract and two miles long. Without entering upon a review of the numerous cases upon the subject of riparian rights, we are very clear that the deeds or patents from the State to Dunn and Condit carried to them no more of the swamp and overflowed lands than were included in the several surveyed subdivisions bounded by the lake. As fully supporting our conclusions in this case, and upon the general subject of grants of lands bordering upon natural lakes, we cite the following authorities: *State v. Milk, supra*; *Boorman v. Sunnuchs* [1877], 42 Wis. 233; *State v. Gilmanton* [1839], 9 N. H. 461; *Seaman v. Smith* [1860], 24 Ill. 521; *Fletcher v. Phelps* [1856], 28 Vt. 257; *Mansur v. Blake* [1873], 62 Me. 38; *Wheeler v. Spinola, supra*; Angell, *Watercourses* §41; *Paine v. Woods* [1871], 108 Mass. 160; *Diedrich v. Northwestern Union R. Co.* [1877], 42 Wis. 248, 24 Am. Rep. 399." To the same effect is the case of *Tolleston Club v. Lindgren, supra*

We are aware that in the case of *Gary Land Co. v. Griesel, supra*, the Supreme Court, referring to the case last cited, said: "There are doubtless distinctions in the facts between that case and this, *but if it can be said to be in conflict with the rule herein declared it is expressly overruled.*" (Our italics.) It must be admitted that the case of *Tolleston Club v. Lindgren, supra*, can not be reconciled with some of the more recent cases of the Supreme Court. The same thing, however, may be said of the earlier cases of the Supreme Court. The language quoted from the case of *State v. Portsmouth Sav. Bank, supra*, is wholly irreconcilable with the announcements of some of the later cases, yet the former case has never been expressly

overruled, criticised or modified; and it expressly recognizes the limitation of authority imposed on the State's officers in the sale of swamp lands of the State under the act here involved and also expressly states that such officers "were authorized to sell those lands by surveyed legal designated and platted subdivisions and at no less than \$1.25 per acre". It is this limitation of authority which furnishes the reason for treating a meander line as a boundary line circumscribing the acres sold to the State's patentees in its swamp land patents. In the case of *Tolleston Club v. State*, *supra*, which seems to be in conflict with *Tolleston Club v. Lindgren*, the Supreme Court said: "If the meander line in this case were actually, or by necessary implication made a boundary of the lands sold it is of course evident that such boundary would stand just as any other boundary named or described." In view of the provisions of the act of the legislature, above indicated, we are unable to see how such necessary implication can be avoided. It is useless, however, to discuss the decided cases further.

At the time of the sale by the State of the abutting lots, the disputed territory was in fact swamp land or marsh of the same kind and character as that sold by the State, and which the act in question required to be sold and not given away. When the State, in any given case, sold swamp lands or overflowed lands that were bounded by a river, of course, under the law of the State, the purchaser took to the thread of the stream, but when the State sold swamp and overflowed lands, it did not give the purchaser the right to take all swamp and overflowed lands that adjoined the land that he bought. It gave him the right to the

land sold to him and to none other. Land.
15. is never appurtenant to land. The doctrine of riparian ownership applies only where the watercourse is in fact the boundary of the lands to which the doctrine is sought to be applied, and where there is uncertainty as to whether the meander line or the watercourse was intended as the boundary in determining such question reference must be had to the conveyance to the party claiming the application of such doctrine and to the time of such conveyance, and not to a remote time of conveyance. *Ocean City Assn. v. Schriver* (1900), 64 N. J. L. 550, 559, 46 Atl. 690, 51 L. R. A. 425; *Johnston v. Jones* (1862), 1 Black 209, 221, 17 L. Ed. 117; *James v. Howe* (1885), 41 Ohio St. 696, 709.

It follows from what we have said that the decision of the trial court is not sustained by sufficient evidence, and the judgment below is therefore reversed with instructions to the trial court to grant a new trial and to take such other steps in the case as may be consistent with this opinion.

Shea, C. J., Ibach, P. J., Felt and Moran, JJ., concur. Caldwell, J., not participating.

ON PETITION FOR REHEARING.

HOTTEL, J.—In their petition for rehearing appellees say that the court has repeatedly stated in its original opinion in this case that the official plat with reference to which all the conveyances were made shows the marginal lots to abut upon the *meander line* of the Kankakee River. They insist that this is an erroneous statement; that the *meander line* of the Kankakee River “is not shown upon the original government plat.” This is a departure from the position taken by appellees in

their original brief. In such briefs in their statement of the "nature of the action", appellees designate the lands in controversy as "lands * * * situated between the *government meander lines of the Kankakee River.*" In their statement of the evidence they say: "In reference to the meander lines the field notes describe them as 'meanders of Kankakee River commencing at post on west boundary, thence up stream on left bank', etc. Many other references in their original brief are to the same effect. Upon this subject, the position originally taken by appellees and adopted by this court was in accord with the uncontradicted evidence in the case. Such plat when interpreted in connection with the government field notes which appellees introduced in evidence and which were proper for no other purpose except to aid in arriving at a correct interpretation of the plat, shows clearly that such boundary, or border line, was in fact the meander line of such river as meandered by the government survey.

Our attention is also called to a statement in the original opinion that "all the patents executed by the State to marginal lots were pursuant to the act of the General Assembly of the State of Indiana, approved May 29, 1852." We should have excepted from this statement, patent No. 54 to Edward Hawkins, for lot number 2 in section 21 and lot number 1 in section 28, both in township 33 north, range 3 west, which patent was issued under an act approved March 7, 1883, entitled "An act authorizing the sale and conveyance of certain lands belonging to the State," etc. The exception of this patent from such general statement in the original opinion could have had no controlling influence on the conclusion reached which necessitated the reversal of the judgment, and for

the purposes of the real question therein considered and involved in this appeal, the effect of patent No. 54 is not of controlling importance and hence will not now receive further consideration.

Appellees claim, in effect, that according to the original opinion the riparian doctrine was applied to the State's patent from the United States

11. on the theory that the meandered territory was a river in 1853 and such doctrine held inapplicable to the patents issued by the

14. State because such territory had ceased to be a river in 1857; that it is begging the question to say that the meandered territory was a river in 1853 and ceased to be such four years later. We do not think the original opinion subject to the interpretation which appellees thus seek to place on it. It is true that both the question whether the State received title from the United States government to the lands in controversy, and the question whether it parted with title to the same lands is made to depend on whether the meander lines of the Kankakee River, as indicated on the government plat adopted by both the United States and the State in conveying said lands, should be treated as a boundary line limiting the lands surveyed and intended to be conveyed, or whether such meander line should be treated as marking the sinuosities of the banks of the meandered stream, and the stream itself, the natural monument, be treated as fixing the boundary of the lands conveyed. This court concluded that, as between the United States and the State such meander lines should be treated as marking the sinuosities of the Kankakee River, and that the natural monument, the river, should be treated as the boundary, and hence the State took title to the lands in question under the doc-

trine of riparian ownership, but that as between the State and its grantees or patentees, such meander line should be treated as a boundary line marking and limiting the acres sold.

It is very earnestly insisted by appellees that in holding that such lands were not included in the patents issued by the State the court "lost sight of one controlling fact, or circumstance, and that is, *the significance* of the official plat." Upon this subject they say: "Under the law plats were required to be filed with the county auditor and undoubtedly for the purpose of public information and they likewise became the basis of all sales and were equivalent to a declaration by the State as to the character and boundaries of the lands to be sold." We entirely agree with this contention. Such plats, however, were no more a part of the public record than was the law which required them to be filed with the county auditor, and such plats, in so far as they were a declaration of the State, were made such by the law and they should therefore be read and construed in the light of that law. The difference between the intent expressed in, and the authority given, by the Act of Congress and the intent expressed and authority given by the act of the legislature furnishes the ground upon which the court based its conclusion that such line should be treated as a meander line of the river in the first instance, and a boundary line limiting the acres sold in the second instance.

When such plat referred to in the State's patents is interpreted in the light of the act of the legislature authorizing its use, the meander line on such plat must necessarily be construed as a boundary line, marking and defining acres. The State's officers or agents authorized to make such sales were required to make or adopt a survey that

measured the acres in each tract sold. The government plat did this, but it did it and could do it only on the theory that such meander line was a boundary line. By treating such line as a boundary line marking and limiting the acres in each tract to be sold, the agents of the State could and did ascertain the number of acres in the respective tracts sold, and in so doing acted in strict compliance with the law authorizing such sales, which was the only authority that gave them any power to act in such matter. If said meander line is not treated as a boundary line then the State's officers or agents never either made or adopted any survey which marked and limited the number of acres in the respective tracts sold by them, and hence violated the authority under which they acted.

The officers, authorized to act for the State in such matter, were as effectively bound and

16. limited in their authority by the act of the legislature as an agent of an individual would be in acting under the same express authority in writing; and those who purchased through the agents of the State were charged with knowledge of the authority under which such agents acted, and the scope and extent thereof the same as they would have been had they purchased from an agent of an individual with full knowledge of the authority under which he acted. This principle is in effect recognized and expressed in the case of *State v. Portsmouth Sav. Bank* (1886), 106 Ind. 435, 459, 7 N. E. 379, and is the principle on which the court, in its original opinion bases its interpretation of the patents issued by the State. This principle as indicated in the original opinion, has been recognized and approved by the later cases and finds repeated recognition by the courts of

other jurisdictions, including the Supreme Court of the United States.

The patents themselves and all of the written evidence in connection therewith in this case show that both the agents of the State, intrusted

11. with such sales, and the respective patentees or purchasers of said lands treated the government plat as indicating and marking the

14. number of acres in the respective lots sold by the State, and hence necessarily treated said meander line as one of the boundary lines of their respective tracts. It follows that in interpreting said plat, made a part of the patents issued by the State, the court has adopted that interpretation made necessary by the law which authorize both the patents and the plat, and in so doing has likewise adopted the interpretation placed on such patent by the parties themselves at the time the sales were consummated, as shown by all the written evidence and memoranda filed in connection with such sales and the issuing of the patents thereunder.

Finally it is contended by appellees that the opinion is in conflict with a number of decisions of the Supreme Court and has the effect of

17. overruling such cases, and hence that this court has exceeded its authority; that if the opinion correctly interprets the views of the court the case should have been certified to the Supreme Court under §1394 Burns 1914, Acts 1901 p. 565. It is true that the original opinion recognizes that as to some of the questions involved there is apparent conflict in the decided cases, not only in this State but in other jurisdictions as well. The opinion, however, follows the later decisions of the Supreme Court of this State in holding that the State took title to the land in

controversy, and in holding that the State never parted with its title, the opinion, as before stated, is based on a principle that has been given recognition and expression in both the earlier and later decisions of the Supreme Court and by courts of other jurisdictions, as well, including the United States Supreme Court. Under such circumstances we felt at liberty to follow those cases which seemed to us to be supported by the better reason and authority, knowing that if our decision contravenes any, ruling precedent of the Supreme Court a method is provided by which appellees may obtain a consideration and determination of their case by such court.

Petition for rehearing overruled.

NOTE.—Reported in 109 N. E. 530, 111 N. E. 342. As to rights of riparian owners, see 79 Ann. Dec. 639; 7 Am. Rep. 179. As to the power of counties to sell real estate as affected by swamp land act, see Ann. Cas. 1913 E. 530. See, also, under (1) 32 Cyc 1369; (2) 32 Cyc 1026; (3) 32 Cyc 903, 904; (4) 5 Cyc 892, 897, 899; (5) 32 Cyc 906; (6) 32 Cyc 905, 907, 909; (7) 5 Cyc 916; (8) 5 Cyc 899; 32 Cyc 804; (9) 32 Cyc 801-803; (10) 32 Cyc 904-906; (11) 32 Cyc 925, 927; (14) 32 Cyc 1033; (15) 5 Cyc 899, 900; (16) 32 Cyc 914; (17) 11 Cyc 745.

COLVERT ET AL V. HARRINGTON.

[No. 9,010. Filed April 18, 1916.]

1. TRIAL.—*Instructions.*—*Peremptory Instruction.*—In considering a motion for a peremptory instruction the court should accept as true all facts which the evidence tends to prove, and draw against the one asking the instruction all reasonable inferences which the jury might properly draw, and, in case of conflict in the evidence, consider that evidence and those inferences which are favorable to the party having the burden of proof. p. 610.
2. BILLS AND NOTES.—*Action.*—*Burden of Proof.*—In an action on a note, defended on the ground of want of consideration, and that plaintiff was not a *bona fide* holder without notice, the burden was on defendant to make out his defense after plaintiff had produced in evidence the written instruments involved and a stipulation as to the amount of attorney fees in the event of a recovery. p. 610.

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3. **BILLS AND NOTES.—Defenses.—Want of Consideration.**—Evidence to establish a defense of want of consideration is irrelevant as to the indorsees of a note, unless it is made to appear that they had notice, or notice of facts sufficient to place them on inquiry. p. 610.
4. **BILLS AND NOTES.—Action.—Notice.**—The mere endorsement of a note without recourse is not of itself sufficient to put the purchaser on inquiry. p. 611.
5. **BILLS AND NOTES.—Bona Fide Purchaser.—Notice.**—The mere fact that the endorsee of a note objected to endorsement without recourse until he learned that the maker was perfectly solvent does not show that he had constructive notice of any defect in the endorser's title. p. 612.
6. **BILLS AND NOTES.—Bona Fide Purchaser.—Suspicion.**—Circumstances calculated to awaken suspicion merely are not sufficient to show that the purchaser of a note was not a *bona fide* purchaser without notice, but they must be such as to irresistibly lead to the conclusion that he had notice. p. 613.
7. **APPEAL.—Review.—Peremptory Instruction.**—Where appellee's evidence was sufficient to warrant the recovery granted him, and there was no evidence which controverted it in any essential, the court was fully justified in giving a peremptory instruction for plaintiff. p. 613.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Timothy J. Harrington against Charles Colvert and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Charles R. Milford, for appellants.

Dewitt C. Wilson, Martin A. Quinn and Lucas Nebeker, for appellee.

IBACH, C. J.—Action to recover on a promissory note executed by appellant in favor of the Reliable Hog and Cattle Remedy Company, and by it assigned by endorsement, without recourse, to the Lafayette Auto Company, and by it assigned without recourse to appellee before maturity. Appellant Colvert filed answer in three paragraphs, first a general denial, the second averring want of consideration, and the third proceeding

upon the theory that appellee and his endorser both had knowledge of facts which would impeach the validity of the note or at least had knowledge of such facts as were calculated to excite the suspicions of a reasonably cautious person, and sufficient to place appellee upon inquiry as to the validity of the note before purchasing the same. The cause proceeded to trial before a jury, and at the close of the evidence, on motion of appellee, and over the objection and exception of appellant, the court directed a verdict for appellee for the amount of the note, interest, and attorney's fee.

The sole question presented by this appeal is whether the peremptory instruction complained of should have been given. In the consideration of a motion for such an instruction, it is the

1. duty of the court to accept as true all facts which the evidence tends to prove and to draw against the one asking the instruction all reasonable inferences which the jury might properly have drawn and in case of any conflict in the evidence, the court is bound to consider that evidence and those inferences which are favorable to the party having the burden of proof.

The only evidence produced by appellee

2. consisted entirely of the written instruments involved and a stipulation as to the amount of attorneys' fees in the event of a recovery.
3. From that time the burden rested on appellant to make out his defense and, in his effort so to do, he introduced much evidence of the original transaction between himself and the payee, and of the various inducements and promises held out by the payee to appellant to induce him to purchase the goods for the payment of which the note in suit was given, but such evidence is wholly irrelevant as to the endorsees, unless it is

made to appear that they have notice of such facts sufficient at least to have raised in them the duty of making inquiry about the note before purchasing it. Consequently the only question as affecting appellee is whether the evidence shows that the successive purchasers of the note had any notice of appellant's defense to it, or in bad faith refrained from ascertaining such defense. In this connection appellant contends that such questions should have been left to the jury, because the evidence shows the endorsement by the payee and endorsee respectively was "without recourse", and also, that appellee made some objection to the form of the endorsement to him, and the endorsees lived within the same city, where the payee lived, and only twenty miles from where the maker lived.

The precise question presented by appellant's first contention has never been decided by the courts of this State, but we believe that the en-

4. dorsement alone "without recourse" is not sufficient to put the purchaser of such a note upon inquiry. This holding is supported in reason, and it has so been held by the decisions of other states, where cases similar to the present have been under consideration. 7 Cyc 809, 954; 1 Daniel, Neg. Inst. §700; *Borden v. Clark* (1873), 26 Mich. 410; *Kelley v. Whitney* (1878), 45 Wis. 110, 30 Am. Rep. 697; *Elgin City Banking Co. v. Hall* (1907), 119 Tenn. 548, 108 S. W. 1068; *Gale v. Mayhew* (1910), 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648; *Judy v. Warne* (1913), 54 Ind. App. 82, 102 N. E. 386. And so far as this question may be involved in future cases, the legislature has settled it in conformity to this holding. §90891 Burns 1914, Acts 1913 p.120, §38. Appellant has set out at length the testimony of appellee concerning some objection which he made

when he purchased the note with reference
5. to the endorsements having been made
“without recourse”, but there is no evidence of any kind even tending to show that his suspicion was aroused concerning the note itself beyond the solvency of the maker. The evidence discloses that he did not like the form of the endorsement, as no liability rested upon the endorsers, but when his brother who made the endorsement for his immediate endorser informed him that the maker of the note was solvent, the objection which he entertained was removed, and the purchase was made. The evidence is also without conflict that he possessed no fact other than the form of the endorsement which tended to impeach the validity of the note, and no fact or circumstance is shown to cause appellee to be suspicious concerning the consideration for which it was executed. We do not consider that the question of the residence of the parties, in view of all the other evidence in the case, has anything whatever to do with the question of notice or bad faith. Such is the holding of this court in the case of *Wilson v. National Fowler Bank* (1911), 47 Ind. App. 689, 91 N. E. 269. The evidence does not show, neither is it contended, that the note was obtained by the payee by fraud or through coercion. The only contention on appellants' part in this connection is that by the terms of the contract between the original parties when the goods were sold and the note was given in payment thereof, it was provided that if either party became dissatisfied, the contract could be terminated by giving notice and the unsold goods might be returned and credit given on the note therefor. No condition of this kind, and no mention of the contract appeared in the note, but it was left open as a perfect negotiable

note payable at a bank. We believe we are justified also in inferring from all the evidence that appellant did not become dissatisfied with his purchase until more than a month after the purchase of the note by appellees. Facts somewhat similar to these were considered by the Supreme Court of this State in the case of *Tescher v. Merea* (1889), 118 Ind. 586, 21 N. E. 316. It is there held that circumstances which will justify

6. the inference of notice or bad faith, must be pointed and emphatic, and irresistibly lead to the conclusion that the purchaser had notice, before the presumption that he purchased the note in good faith can be overcome. Circumstances calculated to awaken suspicion merely are not sufficient. This proposition is also discussed in *Wilson v. National Fowler Bank*, *supra*.

We conclude therefore that, since appellee's evidence was sufficient to warrant the recovery granted him, and there was no evidence

7. which controverted it, in any essential, the court was fully justified in giving the peremptory instruction complained of. *Hall v. Durham* (1887), 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; *Cleveland, etc., R. Co. v. Heath* (1899), 22 Ind. App. 47, 53 N. E. 198; *Fowler Utilities Co. v. Chaffin Coal Co.* (1909), 43 Ind. App. 438, 87 N. E. 689; *Oleson v. Lake Shore, etc., R. Co.* (1896), 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149. Judgment affirmed.

NOTE.—Reported in 112 N. E. 249. As to who is a *bona fide* holder, see 9 Am. Dec. 272; 44 Am. Dec. 698. As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see 29 L. R. A. (N. S.) 351; 44 L. R. A. (N. S.) 395. As to the burden of proof in an action on a bill or note with respect to defense of want of consideration, see 18 Ann. Cas. 205.

BURGER v. SCHNAUS ET AL.

[No. 9,132. Filed April 18, 1916.]

1. APPEAL.—*Assignment of Errors.—Sufficiency.*—An assignment of error “in overruling appellant’s objections and exceptions”, is too indefinite and uncertain to present any question. p. 615.
2. APPEAL.—*Record.—Questions Presented for Review.—Exceptions.*—On appeal from a judgment confirming the report of commissioners in partition, the ruling of the court on exceptions to the report may be properly assigned as independent error if the alleged error appears upon the face of the proceedings; but if questions of fact are involved in the determination of the ultimate ruling or decision upon such exceptions, and are tried by the court as other questions of fact are tried, the questions arising upon such trial must be presented on appeal through the medium of a motion for a new trial. p. 616.
3. PARTITION.—*Report of Commissioners.—Review.*—Objection of plaintiff in partition that the commissioners considered only eighty acres while the tract actually contained 82.4 acres, was unavailable, where it was apparent not only from the original report considered in connection with the order of the trial court, but from the subsequent report as well, that the commissioners considered twenty-four acres set off to plaintiff as two-sevenths in value of the whole tract being exactly the interest he claimed by the allegations of his complaint. p. 617.
4. PARTITION.—*Report of Commissioners.—Description.*—On appeal from a judgment confirming the report of commissioners in partition, appellee’s objection that the court made the description more definite than that contained in the report is not tenable, where the matter pointed out goes only to details and in no sense changes the meaning of the report. p. 618.
5. PARTITION.—*Attorneys’ Fees.*—In a partition preceeding in which both sides are represented by attorneys, the trial court may in its discretion deny the request of plaintiff to allow fees to be paid to his attorney as a part of the costs of the suit. p. 619.

From Dubois Circuit Court; John L. Bretz, Judge.

Action by Jacob Burger against Joseph Schnaus and another. From the judgment rendered, the plaintiff appeals. *Affirmed.*

Horace M. Kean, for appellant.

W. S. Hunter, for appellees.

FELT, P. J.—Appellant brought this action to partition real estate in Dubois County, Indiana, and alleged that he was the owner in fee of the undivided two-sevenths part of the real estate, and that appellee, Joseph Schnaus, was the owner of the undivided five-sevenths part thereof. Anna D. Schnaus, wife of her coappellee was made a party to answer to any interest she might have in the real estate. By their answer appellees admit that the real estate is owned in the proportions alleged in the complaint and that Anna D. Schnaus is the wife of her coappellee and has no interest in the real estate other than her marital rights. It is alleged in both complaint and answer that the real estate may be partitioned and that commissioners should be appointed to set off to each his respective portion in severalty. Commissioners were appointed and made their report to the court. Appellant filed exceptions to the report which were overruled by the court and the report was thereupon approved and the partition confirmed.

The errors assigned and relied on for reversal are: (1) error of the court in overruling appellant's objections and exceptions; (2) error in approving and confirming the report of the commissioners; (3) error in refusing to allow attorney fees for appellant's attorney as a part of the costs of suit; (4) error in modifying and changing the report of the commissioners in partition; (5) error in overruling appellant's motion for a new trial. The first, second and third specifications of alleged error are also set forth in appellant's motion as grounds for a new trial. The first specification was probably intended to refer to the exception taken to

1. the overruling of appellant's exceptions to the report of the commissioners in parti-

tion, but it is too indefinite and uncertain

2. to present any question. Where the alleged error appears upon the face of the proceedings, the ruling of the court on exceptions to such report may properly be assigned as independent error. Where questions of fact are involved in the determination of the ultimate ruling or decision upon such exceptions, and are tried by the court as other questions of fact are tried, the questions which arise upon such trial may be causes for a new trial of the exceptions, but such questions are not properly presented by independent assignments of error, but should be assigned as causes for a new trial. §663 Burns 1914, Acts 1903 p.338. *Clark v. Stephenson* (1881), 73 Ind. 489, 493; *Quick v. Brenner* (1885), 101 Ind. 230, 239; *Kern v. Maginniss* (1876), 55 Ind. 459, 461; *Radcliff v. Radford* (1884), 96 Ind. 482, 487; *Spray v. Bertram* (1905), 165 Ind. 13, 15, 74 N. E. 502; *Bossert v. Geis* (1914), 57 Ind. App. 384, 389, 107 N. E. 95, and cases cited.

The complaint describes the real estate by congressional survey, "containing 80 acres more or less". The court found the interest as alleged and ordered that there be set off to Jacob Burger two-sevenths in value of the real estate and to Joseph Schnaus, five-sevenths in value thereof. On June 27, 1913, the record shows that each party appeared by attorneys and the commissioners filed and acknowledged their report in open court, which report bore date of June 18, 1913. Thereupon, appellant on said day, filed his written objections to the report and asked that it be not confirmed. Following this entry the record shows that "the court now continues the further consideration of said report until the next term of court." As a part of the proceedings of the same day, June

27, 1913, there appears another report of the commissioners, but the report itself and the jurat of the officer who swore the commissioners bear the date of June 28, 1913. The exceptions filed by the appellant were verified and filed on June 27, 1913. At the October term, 1913, answers were filed to appellant's exceptions to the report. The case was tried on the exceptions in January, 1914, and the court overruled the exceptions to the report, to which ruling appellant duly excepted. The record of the proceedings on the day the judgment was rendered overruling appellant's exceptions contains a copy of the report which is the report dated and verified on June 28, 1913, the day after appellant's exceptions were filed. The record is confusing.

While the second report appears in the proceedings of June 27, it shows by its contents that it was not made until June 28. The second report was on file and before the court when the trial was had on the exceptions and it is the report on which the judgment of partition rests. While not so designated, the second report is in the nature of an amended report and supersedes the first. The exceptions were not filed or directed to the second report, but if we waive this and the other objections pointed out and consider the exceptions as presenting the question sought to be raised thereby, appellant has nevertheless failed to present reversible error.

The principal objection is that the commissioners only considered eighty acres, while in fact the tract described when surveyed was found to contain 82.4 acres. The first report was made out on June 18, and the survey was made on June 24, 1913. Our examination of the first report convinces us that it does not confirm appel-

lant's contention that only eighty acres were partitioned. It shows that twenty-four and one-half acres on the west end of the tract were set off to appellant, and fifty-five and one-half acres more or less to appellee. Considering the report in connection with the court's order it shows that the commissioners considered the twenty-four and one-half acres as two-sevenths in value of the whole tract. The second report shows that the commissioners were ordered to partition "80 acres more or less" and it sets off to "Jacob Burger, as and for his full share and interest" twenty-four and one-half acres, off the west end of the tract, describing it, "being two-sevenths in value". It also sets off to appellee fifty-five and one-half acres more or less, describing it, "being five-sevenths in value". So it is apparent that if it were to be conceded that appellant is right in his contention as to the first report, the second report clearly obviates the objection made. Whether rightly so, appellant was given full opportunity to try out his objections and after such hearing the court found against him. The second report was before the court and it had a right to consider it and base the judgment of partition upon it. If viewed from the standpoint of evidence, we find that there is ample evidence to support the court in overruling the exceptions to the report and rendering the judgment of partition.

The objection that the court made the description more definite than the report is not tenable. The matter pointed out goes only

4. to details and in no sense changes the meaning of the report. Its only effect was to avoid uncertainty and ambiguity. *Winship v. Crothers* (1863), 20 Ind. 455, 456; *Midland R. Co. v. Smith* (1891), 125 Ind. 509, 510, 25 N. E. 53.

Both sides were represented by attorneys throughout the proceedings. The trial court had the right to deny the request of appellant to allow

5. fees for his attorney to be paid as a part of the costs of suit. On the facts of the case we can not say the court abused its discretion. §1265 Burns 1914, Acts 1893 p. 315; *Bell v. Shaffer* (1900), 154 Ind. 413, 425, 56 N. E. 217; *Osborne v. Eslinger* (1900), 155 Ind. 351, 364, 58 N. E. 439, 80 Am. St. 240.

The trial court gave a wide range to the trial and deprived appellant of no substantial right. No error was committed in overruling the motion for a new trial on the exceptions to the commissioners' report. Our examination of the case convinces us that no reversible error is shown on any view that may be taken of the record. The value of the land was taken into account and the commissioners' set off to appellant the amount of land they found to equal two-sevenths in value of the whole tract. Judgment affirmed.

NOTE.—Reported in 112 N. E. 246. As to parties to suits for partition, see 114 Am. St. 80. As to allowance of attorney fees in partition proceedings, see 12 Ann. Cas. 854.

DISHER v. FRENTRESS.

[No. 9,495. Filed April 20, 1916.]

APPEAL.—Term Time Appeal.—Failure to Perfect.—Dismissal.—

Where no time was asked or granted to appellant by the trial court in which to file his appeal bond beyond the term, the filing of what purported to be an appeal bond in vacation in the clerk's office and taking no further action thereon other than to copy the same into the transcript was not a compliance with the statute in reference to a term time appeal, and the appeal not having been thereafter perfected as a vacation appeal, a dismissal was required.

From Orange Circuit Court; *William H. Paynter*, Judge.

Action by Ben Frentress against Albert C. Disher. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

H. B. Alexander, for appellant.

Bayless Harvey and *H. A. Carnes*, for appellee.

MORAN, J.—On May 14, 1915, a decree of foreclosure of a lien for street improvements was entered of record in the Orange Circuit Court against appellant's real estate located in the town of French Lick, Indiana, in the sum of \$438.80, and the real estate was ordered sold to satisfy the same. On October 6, 1915, a motion for a new trial theretofore filed was overruled, to the overruling of which, exceptions were reserved by appellant; and as a part of the same entry the record discloses the following: "The plaintiff now prays an appeal to the Appellate Court of Indiana, and the court fixes the appeal bond in the sum of \$500. Hugh C. Glenn and Burt C. Gruber are named as sureties thereon." On November 3, 1915, the same being in vacation of the Orange Circuit Court, an appeal bond was filed in the clerk's office of the Orange Circuit Court with H. C. Glenn and Burt Gruber, as sureties, which is set out in the record as filed, with no further action taken thereto. And on December 31, 1915, the transcript of the proceedings, together with an assignment of errors was filed in this court, as a term time appeal, and appellant relies upon the same as a term time appeal. As to whether the foregoing state of record is sufficient to constitute a term time appeal is now before the court for consideration upon appellee's motion to dismiss on the ground that the appeal has not been properly perfected as a term time appeal.

No time was asked by or granted to appellant

by the trial court within which to file his appeal bond beyond the term, as disclosed by the record, and the mere filing of what purports to be an appeal bond in vacation in the clerk's office, and taking no further action thereon other than copying the same into the transcript is not a compliance with the statute in reference to a term time appeal. §679 Burns 1914, §638 R. S. 1881; Elliott, App. Proc. §246; Ewbank's Manual (2d ed.) §§90, 91a; *Penn., etc., Plate Glass Co. v. Poling* (1913), 52 Ind. App. 492, 100 N. E. 83; *Michigan Mutual Life Ins. Co. v. Frankel* (1898), 151 Ind. 534, 50 N. E. 304; *Fort v. White* (1915), 58 Ind. App. 524, 108 N. E. 27.

The cause having stood on the docket in this court since December 31, 1915, without any steps being taken to give notice or otherwise perfect a vacation appeal, appellee's motion to dismiss must be sustained. *Fort v. White, supra*. Appeal dismissed.

NOTE.—Reported in 112 N. E. 251.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. KEPHERT.

[No. 8,980. Filed April 20, 1916.]

1. APPEAL.—*Waiver of Error*.—*Briefs*.—Specifications of error set out in the motion for a new trial, but not presented by appellant's brief, are waived. p. 624.
2. APPEAL.—*Review*.—*Weight of Evidence*.—The court on appeal can not weigh the evidence. p. 624.
3. RAILROADS.—*Crossing Accidents*.—*Contributory Negligence*.—*Jury Question*.—In an action for injuries at a railroad crossing, plaintiff's testimony that he and the driver of an automobile in which he was riding approached the crossing and stopped on signal from the crossing flagman to permit a train to pass from the west, that after the train had passed the flagman signalled them to proceed and they were struck by a train from the east, which plain-

tiff could not see until upon the crossing, though he had looked both ways, etc., was sufficient to make the question of contributory negligence one of fact for the jury. p. 624.

4. NEGLIGENCE.—*Imputed Negligence.*—*Negligence of Driver.*—The negligence of one driving an automobile while under the influence of intoxicating liquor, constituting a contributory cause of collision with a train, can not be imputed to his invited guest, unless his condition was known to the guest when he got into the machine, or he remained therein after discovering such condition. p. 625.
5. EVIDENCE.—*Expert Testimony.*—*Offer of Evidence.*—An offer of a nonexpert's testimony should not be made without an offer of the facts on which it was based. p. 627.
6. TRIAL.—*Offer of Evidence.*—An offer of evidence to show the intoxicated condition of the driver of an automobile at the time of injury to his invited guest by collision with a train, should include an offer to make it material by showing that the guest knew of his condition, or that it was the sole proximate cause. p. 627.

From Superior Court of Marion County (91,872);
Clarence E. Weir, Judge.

Action by John Kephert against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Samuel O. Pickens and *Owen Pickens*, for appellant.

Will H. Pigg and *John E. Sedwick*, for appellee.

HOTTEL, J.—On September 4, 1911, appellee, as an invited guest of the owner and driver of an automobile, was being conveyed therein south on Capitol Avenue in the city of Indianapolis. The avenue runs north and south and crosses a number of railroad tracks known as the Union Railway tracks in the city. At the time appellant owned and was operating trains over and upon one of its tracks, and appellee while being so conveyed over the avenue and across such track was injured in a collision between one of such trains and the automobile. This is an appeal from a judgment for \$2,500 recovered by appellee in an action brought

by him against appellant in which he charged that such collision and his injuries resulting therefrom were caused by appellant's negligence. The particular negligence charged in the complaint was in substance as follows: Pursuant to the requirements of an ordinance in force in the city at the time, a flagman was stationed at the crossing. When the automobile approached the crossing an east bound train was approaching from the west on one of the tracks near the north side of the crossing. The flagman signaled the driver of the automobile to stop for the passage of such east bound train. Pursuant to such signal the automobile was stopped. Immediately after such east bound train had passed over the crossing the flagman signaled the driver of the automobile and appellee to proceed. Before starting such automobile they looked and listened for the approach of any other locomotive, and seeing and hearing none and relying on the signal of the flagman, the driver of the automobile started his machine forward and toward the crossing. Such driver and appellee continued to look and listen for the approach of any locomotive or train and, neither of them hearing or seeing any, continued to rely on the signal of the flagman, and the driver of the automobile drove it upon such crossing over which the east bound train had just passed and upon the track over which appellant's train was approaching from the east when the latter train came out from behind the former and collided with the automobile. There was another ordinance of the city which limited the speed of trains to four miles an hour and appellant's train was running in violation of such ordinance at the speed of fifteen miles an hour, etc. There are other averments stating why appellee and the driver could not see or hear the

train that struck their machine and showing that they were without fault, and that the collision was the result of appellant's negligence above set out.

The only error assigned is the overruling of appellant's motion for new trial. This motion contains numerous grounds, but appellant's

1. brief presents only those which challenge the verdict as not being sustained by sufficient evidence and as being contrary to law, and those challenging certain rulings relating to the exclusion of evidence offered by appellant. All other grounds are therefore waived. In support of the first two of these grounds appellant in substance says, that appellee was guilty of contributory negligence and is not entitled to recover under the law and evidence in this case for two reasons: (1) He was guilty of negligence in riding with the driver of the machine while the driver was in an intoxicated condition and on account thereof incompetent to operate the automobile, appellee at the time having knowledge of such fact. (2) Appellee was guilty of contributory negligence because he did not take the proper precautions to protect himself while approaching the crossing where he was struck. As affecting the first contention ap-

pellant admits in its brief that there was

2. testimony that they (appellee and the owner of the automobile, who was the driver thereof) were entirely sober at the time of the collision. This admission leaves such contention without any foundation on which to rest. This court cannot weigh the evidence. As affecting

appellant's second contention, *supra*, ap-

3. pellee testified, substantially as follows: "I was on the left side of the machine and Mr. Nutter was running it. We were going south on

Capitol Avenue and when we got to the crossing where the street crosses the railroad we were hit by an engine. As we approached the crossing I saw a flagman with a lantern and he signaled us to stop. It was 7:15 or 7:30 and was dark. The flagman was standing east of the center of the crossing, pretty well to the east side of the street and pretty well on the north side of the tracks. The first thing I saw as we approached the tracks was the flagman signaling us to stop. He waived the lantern across the street in front of us. Nutter stopped the machine, threw the clutch out and set his brake. The machine was still, but the engine was running. We saw a train coming from the west, going east into the Union Station. The entire train passed, and as the rear end of the train was going past the crossing the flagman swung his lantern for us to go ahead. Nutter released the clutch and brake and drove upon the tracks. On the track next to the one over which the east bound train had just passed, a west bound train was approaching and it ran into us. The front end of the machine was on the first rail when I first saw it. I saw the engine coming and saw it would hit us, and I hollered, Look out! That was the last I knew. Before going upon the crossing I looked both ways. I did not see or hear any train until this one hit us." This evidence was sufficient to render the question of appellee's care when the automobile was approaching the crossing, one of fact for the jury.

It is next urged that the court erred in refusing to admit certain testimony in reference to the habits of intemperance of the driver of the

4. automobile with whom appellee was riding at the time he was injured. The questions.

and offers to prove are as follows: The witness, Scott Maxwell was asked: "Q. During the six months when you had seen him, state to the jury what his condition was most of that time as to whether he was sober or drunk." Appellant offered to prove, "that for the period named in the question the man, Nutter, in question was habitually intoxicated and intoxicated nearly every day, and that as a result of the use of intoxicants in the manner in which we propose to show that he was a habitual drunkard and incapable of handling the machine in question." "Q. I will ask you (the witness A. D. Rose) to state to the jury whether you had any knowledge of his use of intoxicants prior to the date of September 4, 1911." Appellant offered to prove "that the man Nutter in question was an habitual drunkard and an habitual user of intoxicants up to the time of the offense cited in the complaint, wherein he was an habitual user of intoxicants, and further that the witness will answer 'Yes' to the question propounded." "Q. Now, Mr. Rose, I will ask you to state to the jury whether or not this man, H. Nutter, was in the habit of getting intoxicated frequently before and right prior to September 4, 1911." Assuming, without deciding, that the question of Nutter's condition as to being drunk or sober, on occasions previous to the collision complained of, and that his habit in such regard prior to such collision were matters of proper inquiry in the absence of an offer to show that he was in such condition at the time of the collision, and further, assuming without so deciding, that the method of proving such facts and the form of the questions here asked, were the proper method and form of question by which to prove such facts, such offered evidence, in any event, could have been

proper and material for no purpose except as tending to show Nutter's condition at the particular time of the collision, and his condition in such respect at such time could have been material for the purpose only of tending to prove that he was thereby rendered incompetent and unable to manage his automobile, and that such condition was either the sole proximate cause of appellee's injury or was a contributing cause thereof, and in the latter event such contributing cause could not be imputed to appellee unless it had been shown that he knew of such condition of Nutter when he got in his machine, or that he remained in the machine after discovering such condition. *Lake Erie, etc., R. Co., v. Reed* (1914), 57 Ind. App. 65, 78, 103 N. E. 127; *City of Gary v. Giesel* (1915), 59 Ind. App. 565, 108 N. E. 876. The evidence

offered to be elicited by each of such questions was not responsive to the particular question asked, but was broader and involved a conclusion or opinion of the witness which

5. was proper only after the witness had testified to the facts upon which such opinion
6. was based (*Commonwealth v. Eyler* [1907], 217 Pa. St. 512, 66 Atl. 746, 11 L. R. A. [N. S.] 639, note, 10 Ann. Cas. 786; *McQuiggan v. Ladd* [1906], 79 Vt. 90, 64 Atl. 503, 14 L. R. A. [N. S.] 689, 770, note; *Johnson v. Culver* [1888], 116 Ind. 278, 289, 19 N. E. 129); and there was no offer to make such proffered evidence material by showing that it would be followed with questions which would elicit the fact that appellee knew or observed such condition of Nutter, or that such condition was the sole proximate cause of appellee's injury. "The offer to prove must be a statement of a particular fact or facts, and not of general propositions or conclusions, and if the bearing of

the proposed testimony is remote and inferential its relevancy must be suggested." *Russell v. Stone* (1897), 18 Ind. App. 543, 546, 547, 47 N. E. 645, 48 N. E. 650; *Lauter v. Duckworth* (1898), 19 Ind. App. 535, 543, 48 N. E. 864.

As the record comes to us no available error is presented by the exclusion of the offered evidence. Finding no error in the record the judgment below is affirmed.

NOTE.—Reported in 112 N. E. 251. As to imputed negligence, see 110 Am. St. 278. As to accidents to automobiles at railroad crossings, see Ann. Cas. 1913 B 680; Ann. Cas. 1915 B 767. As to imputation of negligence of driver of automobile to occupant, see 19 Ann. Cas. 1225.

MIAMI COUNTY BANK v. STATE OF INDIANA, EX
REL. PERU TRUST COMPANY, GUARDIAN, ET AL.

[No. 9,338. Filed April 21, 1916.]

1. PLEADING.—*Inconsistent Causes.—Tort and Contract.*—Where a paragraph of complaint was on the theory of an action to recover on a guardian's bond, it was insufficient as against a codefendant who was not a party to the bond, though it contained averments sounding in tort that might have been sufficient to show a liability based on alleged wrong in dealing with the trust funds. p. 632.
2. PLEADING.—*Inconsistent Causes.—Tort and Contract.*—A complaint seeking recovery *ex contractu* is inconsistent in theory with a recovery *ex delicto*. p. 632.
3. PLEADING.—*Theory of Action.—Inconsistency.*—A complaint must proceed upon some definite theory and be good on that theory or it will be held insufficient when duly challenged. p. 632.
4. PLEADING.—*Complaint.—Sufficiency.*—A complaint will be sufficient to withstand a demurrer for insufficient facts if the facts averred entitle the plaintiff to any relief upon the theory of such pleading. p. 632.
5. PLEADING.—*Theory of Action.—Inconsistent Causes.—Tort and Contract.*—A complaint which adopts some general theory may aver several facts which, independent of other averments, show a liability, and the plaintiff may recover by proof of so much of his complaint as shows a liability on the general theory of his pleading, but a pleading can not be held good on two or more inconsistent and contradictory theories. p. 630.

Miami County Bank v. State, ex rel.—61 Ind. App. 628.

6. **APPEAL.—Review.—Demurrer to Complaint.—Insufficient Memorandum.**—Although the memorandum accompanying a demurrer may be insufficient to present the defect in a complaint, the court on appeal is not precluded from deciding the question where it is presented by the exceptions to the conclusions of law. p.633.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by the State of Indiana, on the relation of Peru Trust Company, Guardian, against the Miami County Bank and others. From the judgment rendered, the defendant named appeals. *Reversed.*

Cox & Andrews, for appellant.

Albert Ward, for appellees.

FELT, P.J.—The appellee, the State of Indiana on the relation of Peru Trust Company, as guardian of Ruth H., Vera V., Grace L., Westley A., and John F. Perry, minors, brought this suit to recover certain funds alleged to belong to the wards. The first paragraph of complaint is a suit on the guardian's bond, against John F. Perry, former guardian of the wards, United States Fidelity and Guaranty Company surety for John F. Perry on the bond and Millard F. Pearson receiver of the property of John F. Perry. The second paragraph of complaint is against the same parties and also against appellant, Miami County Bank.

The execution of the guardian's bond by Perry, as principal, and by the United States Fidelity and Guaranty Company as his surety, is alleged, and it is also averred that the bond required Perry, to faithfully discharge his duties as guardian and account for all moneys that came into his hands as such guardian and that he failed and refused to do so. The bond is made a part of the paragraph by exhibit, and it is also averred that Perry received

as such guardian \$1,050.54 and that he and appellant unlawfully conspired together for the purpose of converting such trust fund, and did unlawfully convert and appropriate it to their own use and benefit. The appellant demurred to the second paragraph of complaint for insufficiency of the facts alleged to state a cause of action against it, which demurrer was overruled by the court and appellant duly excepted to the ruling. The United States Fidelity and Guaranty Company filed a cross-complaint against appellant and its coappellees in which it set up at length all the facts relating to the guardianship, the receipt, deposit and misuse of the trust funds, and prayed that appellant, John F. Perry and Pearson, receiver, be required to pay into court for the use of the guardian of said wards, the amount of funds received by Perry while acting as guardian of said minors, with interest thereon and a penalty of ten per cent in discharge of the liability on the guardian's bond executed by Perry and cross-complainant. Appellant demurred to the cross-complaint for insufficiency of the facts alleged to state a cause of action against it, which demurrer was overruled by the court and excepted to by appellant. Issues were duly joined on the complaint and cross-complaint. The case was tried by the court and on due request it made a special finding of facts and stated its conclusions thereon.

The general situation, history, issues and facts of the case are similar to those of the cases of *Miami County Bank v. State, ex rel.* (1916), *ante* 360, 112 N. E. 40. There is no dispute about the receipt of the funds by Perry while acting as guardian, his deposit of them in his general personal account with appellant, his failure to account for them, his resignation as guardian and the

appointment of the Peru Trust Company as guardian of the wards for whom Perry had previously acted.

The finding follows in the main the averments of the complaint and cross-complaint and among other things shows that John F. Perry received a check payable to him as guardian of his wards, naming them, in the sum of \$1,050.54, and on September 17, 1913, deposited the same with appellant; that the cashier of the bank when said funds were so deposited knew that Perry was guardian of the wards and that the aforesaid funds belonged to them and not to Perry personally; that at the time the funds were so deposited Perry's account was overdrawn in the sum of \$30.99 and appellant paid the same out of said funds; that soon thereafter John F. Perry borrowed of appellant \$1,300 and placed the same to his credit with the bank and thereafter also deposited \$1,100 to his account; that he checked upon the account and his checks were honored by appellant, and when the note for \$1,300, borrowed money, became due, it was paid by check of Perry out of his personal account in which the trust funds and other funds had been commingled as aforesaid, all with the knowledge and consent of appellant.

The substance of the conclusions of law is: (1) that the relator as guardian should recover of and from John F. Perry, United States Fidelity and Guaranty Company and the Miami County Bank \$1,236.55; (2) that Perry is liable as principal and United States Fidelity and Guaranty Company as surety on the guardian's bond; (3) that Miami County Bank is liable to the relator as guardian, "as principal and cotrustee with John F. Perry to account for the whole of said trust fund"; (4) that the property of Perry and appellant be first

exhausted to satisfy said debt due the relator as aforesaid before payment is required from United States Fidelity and Guaranty Company for any part thereof; (5) that the funds in the hands of the receiver are not subject to the payment of any part of said sum.

The appellant has assigned as errors, the overruling of its demurrer to the complaint and to the cross-complaint; error in each conclusion of law and in overruling its motion for a new trial.

The theory of the second paragraph of complaint is that of a recovery upon the bond of the defaulting guardian. True, the pleading contains

averments sounding in tort against John

1. F. Perry and appellant, but the theory is too apparent to be open to conjecture.

The paragraph seeks to hold appellant li-

2. able as principal upon an instrument it did not execute, and is therefore insufficient, even though the averments sounding in tort might be sufficient to show a liability in a suit for a recovery based on the alleged wrong in dealing with the trust funds. A paragraph which seeks to recover *ex contractu*, is inconsistent in theory with a recovery *ex delicto*. On the theory of the second paragraph of the complaint the relator, as guardian, is entitled to no relief against appellant.

A complaint must proceed upon some definite

3. theory and be good on that theory or it will be held insufficient when duly challenged. True, a complaint will be sufficient to withstand a demurrer for insufficient facts, if the facts averred entitle the complainant to any relief upon the theory of such
4. pleading, but the case at bar does not come within such class of pleadings. It is also true that a pleading which adopts some general

theory may aver several facts which independent of other averments, show a liability, and the complainant may recover by proof of so much of his complaint as shows a liability on the general theory of his pleading. The rules of pleading do not permit the courts to hold a pleading good on two or more inconsistent and contradictory theories. *Dyer v. Woods* (1906), 166 Ind. 44, 51, 76 N. E. 624; *Oolitic Stone Co. v. Ridge* (1908), 169 Ind. 639, 641, 83 N. E. 246; *First Nat. Bank v. Rupert* (1912), 178 Ind. 669, 671, 100 N. E. 5; *City of Union City v. Murphy* (1911), 176 Ind. 597, 599, 96 N. E. 584; *Citizens Tel. Co. v. Fort Wayne etc., R Co.* (1913), 53 Ind. App. 230, 233, 100 N. E. 309, Ann. Cas. 1916 A 132. The second paragraph of complaint is therefore insufficient to state a cause of action against appellant.

There may be doubt as to the sufficiency of appellant's memorandum to present the question on which we have held the second paragraph
6. of complaint insufficient, but the exceptions to the conclusions of law present the same question and we have therefore decided it.

The other questions presented are identical with those decided in *Miami County Bank v. State, ex rel., supra*, and on the authority of that case we hold that the court erred in overruling appellant's demurrer to the cross-complaint of the United States Fidelity and Guaranty Company, in the conclusions of law which hold appellant liable in this action and in overruling appellant's motion for a new trial. The judgment is therefore reversed with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 112 N. E. 389. As to personal liability of guardians, see 75 Am. Dec. 447.

**BARNARD v. FIRST NATIONAL BANK OF NEWPOINT,
INDIANA.**

[No. 8,897. Filed February 18, 1916. Rehearing denied April 21, 1916.]

1. **CORPORATIONS.**—*Sale of Stock.*—*Rescission.*—*Fraud.*—A sale induced by fraud is not void, but voidable; hence, where plaintiff was induced by fraud to purchase stock in an oil company, the purchase money could not be recovered until rescission and tender of return of the stock in case it was of any value. p. 635.
2. **BANKS AND BANKING.**—*Deposits.*—*Payment.*—*Notice.*—Where plaintiff, who was induced through fraud to purchase stock in an oil company, paid for same by check drawn on his general deposit in defendant bank, and the seller, after depositing the check to his account, drew part of the funds and had the bank certify a check for the remainder, the bank was not liable to plaintiff for having honored the seller's check after notice from plaintiff not to do so, since in the absence of a prior rescission of the stock transaction, the title to the check given by plaintiff and the proceeds thereof passed to the seller and under the circumstances the bank would have been liable to him in case of its refusal to honor his check. p. 636.

From Shelby Circuit Court; *Alonzo Blair*, Judge.

Action by Charles L. Barnard against the First National Bank of Newpoint, Indiana. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

John E. Osborne and *Frank Hamilton*, for appellant.

Bennett & Davidson, for appellee.

IBACH, C. J.—On September 19, 1908, William Kluge sold a number of shares of stock in the German Mutual Oil and Gas Company to appellant. Twenty-five hundred dollars of the consideration was paid by a check drawn in Kluge's favor and on appellee bank. Kluge deposited the check with appellee and the amount thereof was charged to the account of appellant and credited to Kluge. Thereupon Kluge drew out of his account in cash

seventy-five dollars and drew a check to his own order for the balance, which was duly certified by appellee. Two days after this check for \$2,425 had been drawn and certified, appellant notified appellee of certain fraudulent acts which he claimed Kluge had practiced upon him when the original check for \$2,500 was obtained for the stock and notified appellee "not to honor the said check but to hold the deposit for appellant". Later in the day appellee on demand of Kluge paid the amount of the check to him. It is this payment after notice of the alleged fraud that forms the subject-matter of this controversy.

There are three separate paragraphs of complaint; the averments as to the false and fraudulent statements and representations made by

1. Kluge to appellant are in the main the same in each paragraph, so that our discussion will apply to each of said paragraphs alike. It is conceded by appellee that the fraud charged in either paragraph is sufficient to justify a rescission of the sale of the stock. We observe however that there is no charge that before or at the time of the notice relied on, appellant had rescinded such sale by returning or offering to return the certificates of stock which had been transferred to him by the vendor Kluge, nor is it averred that he had ever demanded the return of the check given therefor. It is apparent from appellant's brief that he takes the position that such procedure was wholly unnecessary. His argument is that the stock had no value and yet there is a direct averment in each paragraph that it was worth "not to exceed \$200". He further contends that the sale of the stock to him was absolutely void and therefore the title to the purchase money and the check given therefor was never vested in Kluge

but remained at all times in appellant. This position is not tenable. The rule seems to be well settled that a sale induced by fraud is not void, but voidable. Until appellant rescinded the sale, the money which he had paid for the stock remained absolute in appellee. He would not be permitted to hold the shares of stock purchased, whatever may have been their value, and at the same time recover the amount of the check he had given in exchange for it. *Jarrett v. Cauldwell* (1911), 47 Ind. App. 478, 94 N. E. 790; *Thompson v. Peck* (1888), 115 Ind. 512, 516, 18 N. E. 16, 1 L. R. A. 201; *Woods v. Schearer* (1914), 56 Ind. App. 650, 105 N. E. 917; *Adam, Meldrum, etc., Co. v. Stewart* (1902), 157 Ind. 678, 61 N. E. 1002, 87 Am. St. 240.

It appears from each paragraph of the complaint that the original deposit made by appellant against which the Kluge check was

2. drawn and the deposit by Kluge were general deposits, neither was impressed with a trust, and as the stock transaction was voidable and not void and it had never been voided, the title to the check given for such stock and the proceeds thereof so far as appellant was concerned, rested in Kluge and when appellee received such general deposit of the money and such money became intermingled with other like funds in appellee's bank, the title to the money became absolute in appellee and at the same time it became the debtor of Kluge and impliedly contracted to honor his checks to the extent of the amount of the deposit.

The supreme court of Ohio, while considering like propositions, uses this language: "The relation of bank and general depositors is simply the ordinary one of debtor and creditor, not of agent and principal, or trustees and *cestui que trust*. * * *

The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous." *Cincinnati, etc., R. Co. v. Metropolitan Nat. Bank* (1896), 54 Ohio St. 60, 71, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. 700.

Appellee attaches much importance to the fact that in this case after the deposit had been made by Kluge, the check which he drew against it had been certified by appellee, but we are not inclined to give much force to this fact in the present case. The averments of this complaint reveal the same obligations resting upon appellee to honor the check of Kluge whether such check had been previously certified or not. The vice of this complaint is that it proceeds upon the theory that the stock transaction was absolutely void and not voidable and that courts of equity will follow the funds obtained in such a transaction as if they were trust funds or some tangible chattel easily separated and distinguished from others. And to support his contention that it was the appellee's duty to withhold payment of any of Kluge's checks after notice of the alleged fraud, appellant cites *Pearce v. Dill* (1897), 149 Ind. 136, 48 N. E. 788. This case shows that the original deposit was in the wife's name, that the husband had authority to draw checks in the transaction of the wife's business. He drew checks in settlement of his individual bucket shop deals. The check in controversy not being issued within the authority given the husband, no title passed to Pearce, the payee of such check, as he could obtain under the facts no greater title than the husband, who had no authority over the fund except as the business affairs of his wife required and the bank upon

which the check to Pearce was drawn, when it received it for deposit, knew all these facts. In the case of *Drumm-Flato Com. Co. v. Bank* (1902), 92 Mo. App. 326, Setter, the party who sold the cattle, had no title either to the cattle nor the proceeds. It was therefore a void sale. Likewise in the case of *Alexander v. Swackhamer* (1886), 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180, the court held that the contract under which Swackhamer parted with the title to the "pretended Johnson" was wholly void and therefore the title and ownership did not pass to said Johnson. In these, as in all the other cases cited by appellant, the original transaction between the parties was absolutely void and no title passed. It is quite apparent therefore that appellant has been misled by reason of his failure to recognize the distinction between a void transaction and one which is voidable, at the option of the party charging fraud. In the present case Kluge took title to the consideration which he received for the stock sold and was entitled to such consideration, whatever form it assumed, until appellant in some legal manner divested him of such title and as the stock is alleged to be of some value appellant could not again obtain that which he had parted with for the stock until he restored or offered to restore to Kluge the stock which he had received in the transaction. This he did not do until after payment of the check to Kluge.

Each paragraph of the complaint clearly discloses that appellee without notice of any fraud paid part of appellant's check when presented by the payee, in cash, certified the balance and paid that also several days thereafter. This transaction appears to have been *bona fide*. Appellee did nothing more with reference to the fund in

suit than the law required it to do. Banks are required to honor checks of their general depositors so long as such depositor's funds are not drawn out, and damages are recoverable for refusal to pay the check of a customer who has sufficient funds in such bank subject to his check, so that it seems to us that under the facts of this case appellee owed no duty to appellant to make itself liable for damages for a refusal to pay Kluge's check by waiting until appellant might decide whether he wanted to return the stock and by proper action seek to regain the purchase money or ratify the transaction and sue Kluge for the damages sustained through the alleged fraud. The inherent necessities of the banking business require that obligations such as were created between appellee and Kluge be held valid. To cast doubt upon such transactions would tend to disrupt the banking business of this country. It would certainly be against public policy to subject a bank to the payment of costs and damages, that has received money in the usual course of business from a depositor, crediting him therewith and thereby entering into an implied contract to pay his checks, after it has refused payment of one of his checks simply because some other person, after such deposit was made, has claimed that he is entitled to the fund deposited rather than the depositor. *Zane, Banks and Banking* §209. *Founer v. Smith* (1891), 31 Neb. 107, 47 N. W. 632, 28 Am. St. 510, 11 L. R. A. 528; *Mt. Sterling Nat. Bank v. Greene* (1896), 99 Ky. 262, 35 S. W. 911, 32 L. R. A. 568. Judgment affirmed.

NOTE.—Reported in 111 N. E. 451. As to deposits made by fiduciary, see 42 Am. Rep. 168. As to liability of bank for refusal to pay check when having funds therefor, see 15 L. R. A. 134.

WENGER ET AL v. CLAY TOWNSHIP OF ST. JOSEPH
COUNTY ET AL.

[No. 8,991. Filed April 25, 1916.]

1. PLEADING.—*Demurrer*.—*Memorandum*.—A demurrer to an answer, unaccompanied by a memorandum of defects, raises no question. p. 641.
2. CONTRACTS.—*Interest in Real Estate*.—*Validity of Contract*.—An instrument in the form of a deed conveying and warranting "the right to take gravel, sand and soil" to be paid for at a certain price for each cubic yard taken, providing that the grant shall be perpetual, duly signed and acknowledged by both parties and recorded, must be treated as the conveyance of a voluntary interest in land, and was valid as between the parties and their privies. pp. 641, 643.
3. CONTRACTS.—*Interest in Real Estate*.—*Profit a Prendre*.—The right to enter upon the lands of another and remove such portion of the soil as is granted is termed a *profit a prendre*, and it takes the character of an interest or estate in the land itself, rather than that of a proper easement, and may be held in fee, for life or for years; but a contract to sell gravel, sand and soil from one's land, while attached to the land, may be so worded as to pass no title until the same is severed from the land. p. 642.

From the St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Susana Wenger and others against Clay Township of St. Joseph County and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed*.

Hubbell, McInerny, McInerny & Yeagley and *J. Elmer Peak*, for appellants.

Anderson, Parker, Crabill & Crumpacker, for appellees.

IBACH, C. J.—Appellant Susana Wenger entered into a written contract with appellee township, in the year 1903, whereby she conveyed and warranted to appellee "the right to take gravel, sand and soil" from certain lands owned by her at that time, and in which the remaining appellants acquired an interest afterwards. The remaining

provisions of the contract material to the question we are called upon to determine are: "The said gravel, sand and soil to be taken in such quantities, from such points and at such times as said second party (appellee) desires. The said second party agrees to pay first party the sum of ten cents per cubic yard for such gravel, sand and soil as is taken under this agreement: this agreement is to run with said land perpetually hereafter from the date of the execution of this contract."

This suit was brought by the appellants, who now claim to own the land involved, to quiet their title thereto, and the cloud which it is averred exists is the aforesaid agreement which has been made a matter of record. The answer and cross-complaint filed by appellees are each based on the same agreement, and by the cross-complaint appellees seek to have the rights granted thereunder established and quieted. Appellants filed joint demurrers to the answer and cross-complaint, which were each overruled and judgment entered in favor of appellees in accordance with the prayer of the cross-complaint. These rulings present the only question for review. The demurrer to

1. the answer raises no question, as no memorandum was attached thereto. §351 Burns 1914, §346 R. S. 1881; *Muncie Electric Light Co. v. Joliff* (1915), 59 Ind. App. 349, 109 N. E. 433; *Quality Clothes Shop v. Keeney* (1915), 57 Ind. App. 500, 106 N. E. 541.

The question presented by the demurrer to the cross-complaint is the validity of the agreement upon which this pleading is based. Appel-

2. lants' position is that such writing is wanting in consideration and mutuality and is therefore invalid, while appellee insists that it

constitutes a voluntary grant of an interest in lands, and as between the contracting parties and their privies it is valid without an expressed or unexpressed consideration. It must be conceded that the writing is in many respects similar to a deed. It provides that "the first party conveys and warrants to the second party the right to take gravel, sand and soil from any part of the land," then follows a description of the land, and then it is provided that the grant is perpetual from the date of its execution. It contains also a provision for the payment of the consideration agreed on for each cubic yard of gravel taken. The signature of both parties is attached, and it was acknowledged before a notary public. The writing was recorded by appellee township in the deed records of St. Joseph County. It must be presumed also that the parties to the instrument, in the absence of fraud or undue influence or mistake, intended that the writing should be in the form of a deed, for it was so prepared and signed by them. It may also be presumed that it was so prepared because of the statute which requires all conveyances of land or of any interest therein to be in writing. The authorities also are uniform in holding that the subject-matters, "sand, gravel and soil", are susceptible of a grant, and it is settled that a voluntary conveyance of an interest in land is valid as between the parties and their privies, although there be no consideration, expressed, or unexpressed. 1 Jones, Conveyancing §266; *Randall v. Ghent* (1862), 19 Ind. 271.

The right to enter upon the lands of another and remove such portion of the soil as is granted has been described by law writers and in the older authorities as well as in some of the later ones

3. as a *profit a prendre*. In 23 Am. and Eng. Ency. Law (2d ed.) 188, this language is used,

"Where the right of *profit a prendre* belongs to an individual distinct from the ownership of the lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement, and may be held in fee, for life or for years." See, also, *Huff v. McCauley* (1866), 53 Pa. St. 206, 91 Am. Dec. 203; *Johnstown Iron Co. v. Cambria Iron Co.* (1858), 29 Pa. St. 241, 72 Am. Dec. 783; *Heller v. Dailey* (1902), 28 Ind. App. 555, 561, 63 N. E. 490; *Knight v. Indiana Coal, etc., Co.* (1874), 47 Ind. 105, 17 Am. Rep. 692; *Bracken v. Rushville, etc., Road Co.* (1866), 27 Ind. 346. Appellants' position is correct in the contention that such portions of the soil as are involved here may be severed from the land and when so severed, they become goods and chattels. And it is also true that a contract to sell materials such as those in suit, while attached to the land, might be worded so as to pass no title until the same are severed from the land and thereby become personal property. But unfortunately, such

2. facts do not appear here. On the contrary, by the execution of the written contract before us, it is quite apparent that appellant must be held to have attempted thereby to convey to appellee a present interest in such materials, which, on all the authority we have been able to find, is a transfer of an interest in land, but not exclusive of the right of the grantor to take and dispose of them, and not a sale of personal property.

Since the contract must be held to be valid and binding, it is immaterial whether the instrument itself is called a contract or a deed. Being valid between the parties, it must necessarily be held valid as to the other appellants who purchased an interest in the land, subsequent to its execution and recording. We are therefore constrained

Acme White Lead, etc., Works v. Indiana Wagon Co.—61 Ind. App. 644.

to hold that the cross-complaint was sufficient to withstand the demurrer, and there was no error in overruling it. Judgment affirmed.

NOTE.—Reported in 112 N. E. 402. As to distinction between covenants that run with land and servitude or easements imposed on land, see 82 Am. St. 675.

ACME WHITE LEAD AND COLOR WORKS v. INDIANA
WAGON COMPANY.

[No. 9,020. Filed April 25, 1916.]

NEW TRIAL.—*Motion.—Time for Filing.*—Section 587 Burns 1914, Acts 1913 p. 848, requiring an application for new trial to be made within thirty days from the time when the verdict or decision is rendered is mandatory; hence where a motion for new trial was not filed until more than thirty days after the decision of the court was rendered, no question thereon could be presented on appeal.

From Superior Court of Tippecanoe County;
Henry H. Vinton, Judge.

Action by the Acme White Lead and Color Works against the Indiana Wagon Company. From a judgment for defendant, the plaintiff appeals. *Appeal dismissed.*

George P. Haywood and *Charles A. Burnett*, for appellant.

Kumler & Gaylord, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor for costs in a suit brought by appellant to recover \$952.90, on an account for goods sold and delivered to appellee. Appellee answered the complaint by general denial and also filed a counterclaim or set-off for damages, alleged to have been sustained by it on account of certain alleged defects in the goods so sold and delivered to it. A trial by the court resulted in a finding and judgment in favor of appellee on its

set-off. The only error assigned is the overruling of appellant's motion for a new trial.

The judgment was rendered on May 12, 1913, that being the first day of the May term of said court. The record entries show that the motion for new trial was not filed until June 21, 1913, that being the thirty-sixth day of the May term of said court, and more than thirty days after the decision of the court was rendered. Since the amendment of 1913, which became effective April 30, 1913, application for a new trial must be made within thirty days from the time when the verdict or decision is rendered. Acts 1913 p. 848, §587 Burns 1914. This statute has been construed by our Supreme Court since the amendment, *supra*, and held mandatory as to the time of filing a motion for a new trial. *Talbot v. Meyer* (1915), 183 Ind. 585, 109 N. E. 841. It follows that no question is presented by the record. The appeal is therefore dismissed.

NOTE.—Reported in 112 N. E. 392.

FISH ET AL V. HETHERINGTON & BERNER.

[No. 8,978. Filed April 27, 1916.]

1. APPEAL.—*Assignment of Errors.*—*Insufficiency of Complaint.*—Under §348 Burns 1914, Acts 1911 p. 415, an assignment of error challenging the sufficiency of a complaint is unavailable. p. 647.
2. APPEAL.—*Briefs.*—*Questions Presented.*—Where appellant in the preparation of his brief fails to comply with the rules requiring separately numbered propositions or points to be set out under a separate heading of each error relied on, no question is presented. p. 647.
3. APPEAL.—*Transcript.*—*Precipe.*—*Certificate of Clerk.*—*Review.*—Where the precipe directed the clerk to prepare a transcript of the amended complaint, the cross-complaint and all pleadings filed, and to insert the original bill of exceptions, and the clerk's certificate, even if deemed sufficient for any purpose, at most purported to certify that the transcript contained full and true entries in the cause as required by the precipe, copies of the judgment and

motions for new trial and the rulings thereon, not being called for by the precipe nor included in the certificate, were no part of the record though copied therein, and hence no question was presented by alleged error in overruling the motion for a new trial. pp. 647, 648.

4. *APPEAL.—Transcript.—Necessity for Written Precipe.*—Under §690 Burns 1914, §649 R. S. 1881, providing that upon request of the appellant the clerk shall make a transcript of the record, "or so much thereof as the appellant, in writing, directs", etc., a written precipe is not required where a complete transcript is desired. p. 648.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by Hetherington & Berner against George T. Fish and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Charles B. Clarke, Walter C. Clarke, Frank J. Lahr, Joseph B. Kealing and Martin Hugg, for appellants.

Charles O. Roemler and H. O. Chamberlin, for appellee.

HOTTEL, J.—On December 5, 1912, appellee filed its complaint in the Marion Superior Court to recover for material furnished and placed in a theatre building on North Illinois Street in the city of Indianapolis, and to foreclose a mechanic's lien on such building and the lot on which it was located. Such proceedings were had that the cause was venued to the Morgan Circuit Court and the issues were there closed, trial had, and a finding returned in favor of appellee. Each of the appellants, except Halstead-Moore Company, filed a separate motion for new trial which was overruled and judgment rendered on the finding. The appellants separately rely upon the following errors for reversal: (1) The complaint of the appellee does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling this appellant's motion for a new trial.

The amendment of §348 Burns 1908, §343 R. S. 1881, makes the first assigned error unavailable. §348 Burns 1914, Acts 1911 p. 415. *Pittsburgh, etc., R. Co. v. Farmers Trust, etc., Co.* (1915), 183 Ind. 287, 108 N. E. 108; *Combs v. Combs* (1914), 56 Ind. App. 656, 105 N. E. 944. The second

1. assigned error presents no question for either of two reasons, viz.: (1) Appellants in the preparation of their brief have failed to
2. comply with the rules of the court requiring them to set out "*under a separate heading of each error relied on, separately numbered propositions or points.*" *Cleveland, etc., R. Co. v. Ritchey* (1916), 185 Ind. —, 111 N. E. 913; *Palmer v. Beal* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases cited. (2) The record, although purporting to contain a copy of the judgment, the several
3. motions for a new trial, and the exceptions to the various rulings challenged, is defective in that such judgment, motions and exceptions are not covered by, or included in, the clerk's certificate to the transcript of the record filed in this court. Appellants' precipe for such transcript reads as follows: "You will please make out a transcript for appeal to the Appellate Court of Indiana, of the amended complaint, the cross-complaint and all pleadings filed to, or addressed to the amended complaint or cross-complaint or answers. You will please insert in said transcript the original bill of exceptions without copying." The clerk's certificate reads as follows: "I, William H. Payne, clerk of the Morgan Circuit Court within and for said county and state, do hereby certify that the above and foregoing transcript contains full, true and entries in said cause required by the above and foregoing precipe, and the original bill of exceptions No. 1 containing

the long-hand transcript of the evidence." The law does not require a written precipe for a

4. transcript in all cases where a complete transcript is desired, but does provide that "Upon the request of the appellant * * * the clerk shall forthwith make out * * * a transcript of the record in the cause, or so much thereof as the appellant, in writing, directs, certified and sealed, to which shall be appended the written directions of the appellant above contemplated, if any." §690 Burns 1914, §649 R. S. 1881. See also §667 Burns 1914, Acts 1903 p. 338, §7. The clerk's certificate is so defective that it is

3. questionable whether it is sufficient for any purpose; but, at most, it only purports to certify that such transcript "contains full and true entries in said cause required by the above and foregoing precipe and the original bill of exceptions No. 1 containing the evidence." Inasmuch as such certificate is limited to the entries called for or required by the precipe, it follows, as a matter of course, that any entry, judgment, motion, or ruling found in the record, but not required by such precipe is not covered by or included in such certificate and must be disregarded. *Scott v. Lafayette Gas Co.* (1908), 42 Ind. App. 614, 86 N. E. 495; *Brown v. Armfield* (1900), 155 Ind. 150, 57 N. E. 722; *East v. Amburn* (1911), 47 Ind. App. 530, 535, 94 N. E. 895, and cases cited; *Ewbank's Manual* §§10, 115. It will be observed that such precipe does not call for, or require, a copy of the judgment, the motions for a new trial, the ruling on such motions, or the exceptions thereto, and hence not being properly authenticated must be disregarded. See cases, *supra*. The record as presented by appellants' brief showing no available error, the judgment below is affirmed.

NOTE.—Reported in 112 N. E. 391.

VANDALIA COAL COMPANY v. ALSOPP,
ADMINISTRATRIX.

[No. 8,576. Filed June 25, 1915. Rehearing denied November 5, 1915. Transfer denied April 27, 1916.]

1. **MASTER AND SERVANT.—Injuries to Servant.—Employer's Liability Act.—Mine Servant.—Complaint.**—The Employer's Liability Act of 1911 (Acts 1911 p. 145, §8020a Burns 1914), gives no right of action against an employer except for negligence, eliminates the doctrine of assumed risk where there is a violation of an ordinance or statute, or when it arises from obedience to orders or directions from the employer or any one the employe is bound to obey, or is based on known defects in the place of work, or which might have been known, or where the injury arises from dangers or hazards inherent or apparent in such place, and eliminates the defenses of negligence and contributory negligence resulting from obedience or conformity to an order or direction which the employe was bound to obey; and, since §8580 Burns 1914, Acts 1905 p. 65, §12, relating to the operation of coal mines, recognizes two ways of making such mines safe, a complaint for injuries to a mine employe whose duty it was to repair the mine in conformity to an order of the mine boss, which disclosed that the way selected by the boss was dangerous and known so to be, although a safer way could have been selected, and that while attempting to do the work in conformity to such order loose slate fell on such employe, etc., stated a cause of action under the Employer's Liability Act. p. 654.
2. **RELEASE.—Fraud.—Personal Injuries.**—Where plaintiff was induced to execute a release of claim for the death of her husband, killed while at work in a coal mine, by the representations of defendant's agent who took advantage of her necessitous circumstances, and represented to her that it would be six or seven years before she would acquire anything by litigation, that defendant had evidence to show that decedent had assumed the risk, and falsely underrated the ability of her attorneys and stated that their services were worth but a small sum, a reply setting up such facts, showing that plaintiff had been imposed upon, and that immediately on learning her rights she had tendered back to the defendant the check which she received for such release, etc., was sufficient to avoid an answer pleading such release as a defense. p. 657.
3. **APPEAL.—Review.—Pleadings.—Motion for Judgment.**—Where the complaint stated a cause of action and a reply to the answer was sufficient to avoid the answer, the court properly overruled defendant's motion for judgment on the pleadings *non obstante veredicto*. p. 658.
4. **APPEAL.—Review.—Refusal of Instruction.**—Where instructions tendered were either incorrect statements of the law or were sub-

stantially included in instructions given, their refusal was not error. p. 658.

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

Action by Emma Alsopp, administratrix of the estate of Aaron Alsopp, deceased, against the Vandalia Coal Company. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

O. B. Harris and *Henry W. Moore*, for appellant.
Cyrus E. Davis and *Oscar E. Bland*, for appellee.

FELT, J.—This is a suit for damages for the death of appellee's decedent, Aaron Alsopp, alleged to have resulted from the negligence of appellant. The complaint in one paragraph was answered by general denial and by a special paragraph in which it was alleged that the claim had been settled in full before the suit was begun. To the special paragraph of answer, appellee replied that the alleged settlement had been procured by fraud. The case was tried by a jury and a verdict returned for \$2,500. Appellant's motion for a new trial was overruled and judgment was rendered on the verdict from which this appeal is taken. The errors assigned and relied on for reversal are that (1) the court erred in overruling appellant's demurrer to the complaint; (2) the court erred in overruling appellant's motion to strike out parts of the reply; (3) the court erred in overruling appellant's demurrer to appellee's reply; (4) the court erred in overruling appellant's motion for a new trial; and (5) in overruling appellant's motion for judgment on the issues, notwithstanding the verdict of the jury.

The complaint in substance charges that appellant is a corporation operating a coal mine and selling and trafficking in coal in the State of Indiana;

that it employed in its mines 200 men; that the ways and entries through the mine operated by said company were overlaid with a stratum of slate and shale and rock which constituted the roof of the entries; that appellee's decedent was employed by appellant as a timber man to set timbers to prop and secure the roof in the entries and ways of the mines; that many days prior to decedent's injury, the slate and rock in the main south parting or way became loose and likely to fall at any time and was exceedingly dangerous, and so remained until it fell and killed the appellee's decedent, all of which was known to appellant; "That the proper and practical and safe way and method of repairing said roof and making the works and ways of said mine thereunder reasonably safe was by taking down and removing said slate and and rock, which could easily have been done without the necessity of anyone going or being under the same, which facts were at all times known to this defendant. * * * That to repair said roof or secure and make it safe, or to attempt to do so by placing props and timbers thereunder made it necessary for the persons so repairing to go under and be under the same while setting said props and timbers, and exposed such person to the danger of being crushed by a momentary fall of said slate and rock, * * * and was an exceedingly dangerous and unsafe method of making said roof safe * * *, which facts were at all times known to defendant." That pursuant to the laws of Indiana, appellant had in its employ one John Quigley as mine boss and one Hugh Rice as his assistant, or room boss, who had authority to superintend and control all the underground works, ways, machinery, employes, and operations of said mines and to give all orders and directions

to appellant's servants working therein, and had power and authority to employ and discharge them; that by the terms of decedent's employment, he was required to obey all orders and directions of said Quigley and his assistant; that the mine boss and his assistant carelessly and negligently failed to see that said unsafe and dangerous place in said main south parting was made safe and knowingly, carelessly and negligently permitted the same to remain dangerous and unsafe; that on the day that decedent was killed, the mine boss and his assistant undertook to make said place safe and appellant carelessly and negligently failed to adopt the aforesaid safe method of doing the work by taking down and removing the slate and rock, but carelessly and negligently adopted the aforesaid unsafe and dangerous plan of propping and timbering and carelessly and negligently ordered decedent to do the work in that manner; that decedent had no knowledge of the loose and dangerous condition of said roof and of its being likely to fall or of the danger of the aforesaid method of making the place safe, and appellant and its mine boss and assistant negligently failed to give him any warning or information of the loose and dangerous condition of said slate and rock, or of the danger incident to the method adopted by them to make the place safe; that decedent was obliged to obey said orders and did obey the order to go under the roof and while engaged in setting timbers in pursuance of said order, the loose slate and rock fell and killed him. The second paragraph of answer alleges in substance that the demands sued for had been fully settled and adjusted with appellee and a full release therefor executed to appellant by appellee on payment of \$600.

The special reply admits the settlement of the

claim and alleges that it was procured by one Kennedy acting for and on behalf of appellant. It charges that Kennedy falsely and fraudulently represented to appellee that appellant had evidence to show that decedent knew the dangers of the roof when he went to work under it; that her attorneys had wholly failed in other similar cases within his knowledge; that he falsely and fraudulently represented to appellee that their services in this case were not at that time worth over \$25 when in truth and fact they were of the value of \$200, which fact was known to Kennedy; that said statements were false and known to be false by said Kennedy, but appellee did not know of their falsity and relied thereon and believed them to be true and was thereby induced to execute said release; that the decedent was appellee's husband, and she was at the time in great distress on account of his death and her destitute condition with six small children to support; that Kennedy knew her condition and took advantage thereof and told her that if she went to law and recovered it would be six or seven years before she would receive anything and that her lawyers would take most of it if she recovered anything; that she must settle without seeing her lawyers and recommended that she see another lawyer whom he suggested; that such lawyer would advise her properly; that her mind was confused by said representations and her condition aforesaid and relying and acting on said statements, she saw the lawyer suggested by Kennedy and was by him informed that \$25 was enough for her attorneys and all their services were worth; that by reason of the representations and threats aforesaid she signed the release and accepted a check from appellant for \$600; that she never presented the check for payment and

notified appellant that she repudiated and rescinded the settlement and tendered the check back which was refused and she now brings it into court for the use and benefit of appellant.

Appellant contends that the complaint fails to state a cause of action because it shows that appellee's decedent was injured while doing

1. the work he was employed to do and that his death resulted from one of the ordinary hazards of his employment which was assumed by him; that he was employed to make dangerous places safe and assumed the risk of so doing, notwithstanding the averments that he undertook to do such work in obedience to the order of his superior officer; that the complaint shows all the facts indicating danger were known to the decedent and were open and obvious; that for these reasons he could not rely upon the presumption that he would not be ordered to work in a dangerous place. Appellee contends that the complaint avers facts which show a liability under the statute and also under the common law.

Section 8580 Burns 1914, Acts 1905 p. 65, §12, provides that: "The mine boss shall visit and examine every working place in the mine, at least every alternate day while the miners of such places are, or should be, at work, and shall examine and see that each and every working place is properly secured by timbering and that the safety of the mine is assured. He shall see that a sufficient supply of timbers are always on hand at the miner's working place. He shall also see that all loose coal, slate and rock overhead wherein miners have to travel to and from their work, are taken down or carefully secured. Whenever such mine boss shall have an unsafe place reported to him, he shall order and direct that the same be placed in a safe

condition; and until such is done no person shall enter such unsafe place except for the purpose of making it safe." The act of 1911, §1 (Acts 1911 p. 145, §8020a Burns 1914), provides for liability of any person, firm or corporation in this State employing five or more persons, where the "injury or death resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers". Section 2 (Acts 1911 p. 145, §8020b Burns 1914) provides that: "In actions brought against any employer under the provisions of this act for the injury or death of any employe, it shall not be a defense that the dangers or hazards inherent or apparent in the employment in which such injured employe was engaged, contributed to such injury. No such injured employe shall be held to have been guilty of negligence or contributory negligence where the injury complained of resulted from such employe's obedience or conformity to any order or direction of the employer or of any employe to whose orders or directions he was under obligation to conform or obey, although such order or direction was a deviation from other rules, orders or directions previously made by such employer." Section 3 (Acts 1911 p. 145, §8020c Burns 1914) in part provides: "nor shall such injured employe, be held to have assumed the risk of the employment where the injury complained of resulted from his obedience to any order or direction of the employer or of any employe to whose orders or directions he was under obligations to conform or obey although such order or direction was a deviation from other orders or directions or rules previously made by such employer. In any action brought against any employer under the provisions of this act to recover damages for injuries to or the death of, any of his,

its or their employes, such employe shall not be held to have assumed the risk of any defect in the place of work furnished to such employe, or in the tool, implement or appliance furnished him by such employer, where such defect was, prior to such injury, known to such employer or by the exercise of ordinary care might have been known to him in time to have repaired the same or to have discontinued the use of such defective working place, tool, implement or appliance."

The accident which caused the death of appellee's decedent, occurred April 8, 1911, and the Employer's Liability Act from which we have quoted, went into effect on March 2, 1911. The act has been held constitutional by the Supreme Court, except as to §7, which was not passed upon. *Vandalia R. Co. v. Stillwell* (1914), 181 Ind. 267, 104 N. E. 289. In the foregoing decision it is held that the act gives no right of action against an employer except for negligence; that assumption of risk, is removed where there is a violation of an ordinance or statute, or when it arises from obedience to orders or directions from the employer or any one whom the employe is bound to obey, or where the assumption of the risk is based on defects in the place of work, when the defect is known, or by the exercise of ordinary care could have been known in time to repair, or where injury arises from dangers or hazards inherent or apparent in such place; that "The defenses of negligence and contributory negligence resulting from obedience or conformity to any order or direction to which the employe is required to obey or conform * * * are eliminated."

The complaint avers that appellee's decedent was ordered by the mine boss and his assistant to repair the entry in a particular manner; that the

way selected was dangerous and known to them to be dangerous, but nevertheless they negligently selected the unsafe way of propping the roof when they could have selected the safe way of taking down the loose slate and rock; that appellee's decedent was bound to obey the order and while attempting to perform the work in obedience to such order the loose slate fell on him and killed him. The statute recognizes two ways of making such places safe and if the mine boss and his assistant negligently selected the unsafe way as alleged and ordered appellee to do work in that particular manner and he was injured while obeying such order, the appellant is liable under the statute. We therefore hold that the complaint states a cause of action under the "Employer's Liability Act." Since the complaint is sufficient under the statute, it is unnecessary to determine whether it states a cause of action under the common law independent of the statute.

The special reply to appellant's second paragraph is sufficient. The facts averred show that the settlement was procured through deception and misrepresentation under circumstances which deceived and misled appellee; that the check was not cashed, the settlement was repudiated and the check promptly tendered back to appellant as soon as appellee learned of the deception and misrepresentation that had been practiced upon her, by means of which, in ignorance of the facts, and her rights in the premises, she had been induced to execute the release and accept the check. *Miedreich v. Rank* (1907), 40 Ind. App. 393, 82 N. E. 117; *Firebaugh v. Trough* (1914), 57 Ind. App. 421, 107 N. E. 301; *Ray v. Baker* (1905), 165 Ind. 74, 81,

74 N. E. 619. Since we have reached the conclusion that the complaint states a cause of action and that the reply to the answer of settle-

3. ment was sufficient to avoid the answer, it necessarily follows that the court did not err in overruling appellant's motion for judgment on the pleadings, *non obstante veredicto*. §592 Burns 1914, §566 R. S. 1881. *Brown v. Searle* (1885), 104 Ind. 218, 222, 3 N. E. 871; *McCloskey v. Indianapolis Mfg., etc., Union* (1879), 67 Ind. 86, 90, 33 Am. Rep. 76.

The instructions given the jury cover every phase of the case and in some particulars were more favorable to appellant than the law warrants.

4. Some of those refused are incorrect statements of the law as applied to the issues and evidence in the case. Those tendered and refused which are correct were in substance included in others given to the jury. No error harmful to appellant was committed either in the giving of instructions or in the refusal of those tendered by appellant.

We have examined the evidence, and find there is evidence tending to support the verdict on every material proposition involved in the issues. The case seems to have been fairly tried and no harmful error to appellant is presented. Judgment affirmed.

Shea, C. J., Ibach, P. J., Hottel, Caldwell and Moran, JJ. concur.

NOTE.—Reported in 109 N. E. 421. As to constitutionality, application and effect of Employer's Liability Act, see 47 L. R. A. (N. S.) 38, L. R. A. 1915 C 47. On the necessity of returning or tendering consideration on repudiation of release of damages for personal injuries, procured by fraud, see 4 Ann. Cas. 655; 10 Ann. Cas. 739; Ann. Cas. 1912 D 1084.

WACHSTETTER ET AL. v. JOHNSON ET AL.

[No. 8,536. Filed April 22, 1915. Rehearing denied December 17, 1915. Transfer denied April 27, 1916.]

1. HUSBAND AND WIFE.—*Rights of Wife in Estate of Deceased Husband.—Statutory Provisions.*—The rights of a wife in the lands of her deceased husband are to be determined by the statutory provisions relating thereto, since tenancy by dower is abolished, and under §3014 Burns 1914, §2483 R. S. 1881, providing that one-third of the real estate of which the husband dies seized shall descend to the widow in fee simple, etc., she takes such interest in the lands he died seized of as an heir, while under §3029 Burns 1914, §2491 R. S. 1881, providing that a widow, except as excepted in the section above referred to, is entitled to one-third of all the real estate of which the husband may have been seized in fee simple at any time during the marriage and in the conveyance of which she may not have joined, and also of all lands in which her husband had an equitable interest at the time of his death, etc., she takes by virtue of her marital rights. p. 665.
2. HUSBAND AND WIFE.—*Rights of Wife in Estate of Deceased Husband.—Nature of Interest.*—A married woman is regarded as a purchaser for a valuable consideration of all the property which accrues to her by virtue of her marriage. p. 666.
3. HUSBAND AND WIFE.—*Inchoate Interest of Wife.—Judicial Sale.—Statutes.*—Section 3052 Burns 1914, §2494 R. S. 1881, providing that where the inchoate interest of a married woman is not directed to be sold by the judgment or barred by virtue of the sale, it becomes absolute and vests in the wife in the same manner and to the same extent as upon the death of the husband, does not apply to sales of real estate upon judgments rendered prior to the taking effect of same, and prior to such statute a judicial sale vested the whole title in the purchaser subject to the inchoate right of the wife in one-third of the land sold in the event she survived her husband. p. 666.
4. HUSBAND AND WIFE.—*Rights of Wife in Estate of Deceased Husband.—Statutes.—Construction.*—The statutory enactment in lieu of dower is liberally construed in favor of the widow and is regarded as analogous to dower. p. 668.
5. HUSBAND AND WIFE.—*Inchoate Interest of Wife.—Foreclosure Sale.*—Where a husband acquired property subject to a judgment foreclosing a mortgage lien which he agreed to pay as a part of the purchase price, and the property was thereafter sold to satisfy such mortgage, the wife, by virtue of her marital rights, could redeem her one-third interest after the death of her husband, she not being a party to the foreclosure proceeding. p. 668.
6. HUSBAND AND WIFE.—*Inchoate Interest of Wife.—Acts of Husband.*—When a husband becomes seized of the title to lands in

fee simple, the interest of his wife attaches as an incident to his seizing, and no act or conveyance by the husband without her joining therein in some manner can sever, divest or extinguish her interests. p. 670.

7. HUSBAND AND WIFE.—*Inchoate Interest.*—*Bona Fide Purchaser.*—In view of the provisions of §3037 Burns 1914, §2499 R. S. 1881, that no act or conveyance, performed or executed by the husband without the assent of his wife evidenced by her acknowledgment thereof in the manner required by law, etc., shall extinguish her rights, the fact that a grantee paid a full and fair consideration and that he believed his grantor to be a single man, would not prevent the inchoate interest of grantor's wife from ripening on the death of her husband. p. 672.
8. MORTGAGES.—*Foreclosure.*—*Deed.*—*Relation.*—Where there is a sale on a decree of foreclosure of a mortgage the deed to the purchaser relates back to the execution of the mortgage. p. 674.
9. HUSBAND AND WIFE.—*Inchoate Interest.*—*Judicial Sale.*—Where it appeared that grantee at the time of purchasing at a judicial sale and taking a sheriff's deed, already had on record a warranty deed to the realty in question from one who was at the time of its execution the owner in fee simple, and that the judgment lien upon which the sale was had, as well as all other liens, were to be paid by grantee as a part of the purchase price, the complete legal title was already in grantee at the time of the judicial sale and the title acquired at such sale merged into it, so that the inchoate interest of grantor's wife, who had not joined in the execution of the warranty deed, was not barred by such judicial sale, notwithstanding the lien for which the property was sold was in existence when grantor acquired his title, and upon the death of grantor such inchoate interest ripened into an estate subject to incumbrances that were paramount to it when grantor took title. p. 674.
10. APPEAL.—*Review.*—*Evidence.*—*Findings.*—Where the evidence showed that six lot owners who were tenants in common of a strip back of their lots deeded their interests to each other, in severalty so that each became the owner of the strip adjoining such lot, the interest of appellees, based upon the inchoate right of their mother, widow of the former owner of such strip who conveyed without his wife joining, amounted to an undivided one-third part in value of the undivided one-sixth of that portion of the strip adjoining the particular lot involved, so that a finding that the appellees were the owners of an undivided one-third interest was erroneous. p. 676.
11. APPEAL.—*Review.*—*Harmless Error.*—*Admission of Evidence.*—There was no error in the admission of certain parol evidence, where it appears that such evidence was covered by documentary evidence admitted without objection. p. 677.
12. EVIDENCE.—*Parol Evidence.*—*Consideration for Deed.*—Where parol evidence admitted over the objection of appellants went

no further than to explain the consideration for the conveyance involved, there was no error in admitting the same. p. 678.

13. HUSBAND AND WIFE.—*Inchoate Interest of Wife.—Redemption.—Payment of Mortgage.—Subrogation.*—Where a grantee, under a conveyance from a married man in which the wife did not join, paid a mortgage lien existing when grantor acquired the property, a conclusion of law, in an action by the children of grantor against the heirs of grantee to redeem their mother's inchoate interest, that grantee's heirs are entitled to be subrogated to the amount paid by grantee on the mortgage lien together with interest at six per cent from date of grantor's death, etc., was not erroneous. p. 678.

From Marion Circuit Court (17,476); *Charles Remster*, Judge.

Action by Thomas E. Johnson and others against Emeline D. Wachstetter and others. From the judgment rendered, the defendants appeal. *Reversed in part and affirmed in part.*

Ferdinand Winter and Kealing & Hugg, for appellants.

Gavin & Gavin, for appellees.

MORAN, J.—On November 18, 1905, Jacob Wachstetter departed this life, testate, at Marion County, Indiana. By his will he bequeathed and devised all of his property to appellants; and by reason thereof they claim to be the owners in fee simple of certain real estate in the city of Indianapolis, basing their title on a warranty deed executed by the father of appellees and a sheriff's deed executed by the sheriff of Marion County to one John A. Heidlinger, a grantor of Jacob Wachstetter. Appellees claim to be the owners in fee simple of an undivided one-third part in value of said real estate, asserting title through their mother, on the theory that their father was a remote grantor of Jacob Wachstetter to the real estate in question, and that their mother died subsequent to their father, and never joined in the deed of con-

veyance nor parted with her inchoate interest therein. The complaint is in two paragraphs; the first seeks to quiet title to an undivided one-third part of the real estate in question and for partition, alleging that the real estate is not susceptible of division, and should be sold and the proceeds distributed among the parties according to their interests. By the second paragraph of complaint, appellees seek to redeem an undivided one-third part of the real estate from a lien based on a decree of foreclosure of a purchase-money mortgage; that the amount of the lien be declared and the amount, if any, be fixed that appellees should pay; the lien be adjudged primarily against the undivided two-thirds interest in the real estate, and after exhaustion to be a lien on the undivided one-third part as owned by appellees; the sheriff's sale to be declared ineffectual to carry title; to have the court adjudge within what time appellees may pay whatever amount should be paid by them; an accounting of the rents and profits to be had; and that the real estate be sold and the proceeds be distributed according to the interests of the parties. Appellants filed a cross-complaint against appellees, alleging the ownership of all the real estate in question and asking that their title be quieted. Appellants answered both paragraphs of complaint by a general denial, and addressed a second paragraph of answer to the second paragraph of complaint, alleging that appellees' cause of action did not accrue within fifteen years before the bringing of the same. Appellees replied in general denial to the second paragraph of answer, and for a second paragraph of reply, alleged that their mother, Margaret E. Johnson, was from 1860 to November, 1907, a person of unsound mind. Appellees filed an an-

swer in general denial to appellants' cross-complaint. The cause was tried by the court, and the facts specially found and conclusions of law stated thereon in favor of appellees. Exceptions were reserved by appellants to the conclusions of law, and to the overruling of the motion for a new trial. Judgment was rendered on the conclusions of law. The errors assigned are: (1) Overruling of appellants' motion for a new trial; (2) the error of the court in stating its conclusions of law, Nos. 1 to 12, on the facts specially found.

We proceed first to dispose of the questions arising on the conclusions of law, and in doing so the principal questions presented by the motion for a new trial will be disposed of. A condensed statement of the uncontroverted facts, as gleaned from the special finding of facts, covering some sixty-six pages of the record, is: On May 25, 1835, Oliver H. Smith became the owner of lots 5 and 6 in block 52 in the city of Indianapolis, and by mesne conveyances, Isaac E. Johnson, a married man, and father of appellees, became the owner in 1862, of a part and parcel of lots 5 and 6; the title to which is now in controversy. A part of the same he obtained by deed from Esther Stanley and a part by deed from William J. Larue; both tracts of which were incumbered at the time, and which incumbrances he agreed to pay as a part of the purchase money; and to further indemnify Larue, he executed to him an indemnifying mortgage on both tracts of real estate, his wife not joining therein. Soon afterwards, and before he had discharged the incumbrances, Johnson sold the property in question and other property to John A. Heidlinger, for \$16,500, and agreed to convey the same by a warranty deed. Heidlinger did not know at this time that Johnson was

a married man, nor did he know that the real estate was encumbered. At the time he made the purchase, he paid Johnson \$200, in cash. An examination of the records disclosed incumbrances on the property, consisting of mortgages and judgment liens. A mortgage executed by Stephen M. Norris to Obediah Harris had been foreclosed prior to the purchase by Johnson, but no sale had. After obtaining the information as to the liens, it was agreed between Heidlinger and Johnson that Heidlinger should obtain a sheriff's deed upon a decree of foreclosure of the mortgage covering the real estate in question, in addition to taking a deed of conveyance from Johnson, in order to obtain a clear title; and out of the purchase price all incumbrances should be satisfied, and the balance of the purchase price paid to Johnson, which was done. On May 9, 1864, Johnson conveyed by warranty deed to Heidlinger, and the sale of the real estate by the sheriff took place on May 28, 1864 and on the same day a sheriff's deed was executed to Heidlinger in consideration of the amount of his bid, which was \$50, he being the only bidder therefor. Margaret E. Johnson, mother of the appellees, was a person of unsound mind from 1860 to the date of her death in 1907, having been judicially declared of unsound mind March 22, 1883, in the Owen Circuit Court. Margaret E. Johnson did not join in the deed with her husband to Heidlinger, nor was she a party to the foreclosure proceedings, nor a party to the creation of any of the liens against the real estate in question. Heidlinger conveyed the real estate in question to Jacob Wachstetter, on February 23, 1865, who went into possession immediately thereafter, and his possession and title was undisturbed until June 1, 1883, when

the guardian of Margaret E. Johnson asserted her claim of right to an undivided one-third part of the real estate. Jacob Wachstetter had no actual knowledge that Isaac E. Johnson was a married man at the time he took the deed of conveyance from John A. Heidlinger. Isaac E. Johnson departed this life January 13, 1883, intestate, and Jacob Wachstetter died November 18, 1905, testate. Appellees are the children of Isaac E. Johnson and Margaret E. Johnson. Appellants are the legatees and devisees of Jacob Wachstetter.

On May 6, 1853, tenancy by dower was abolished by statute, and thereafter the rights of the widow in the lands of her husband were determined by statute. In this cause our investigation includes but two sections of the enactment in lieu of or a substitute for dower, viz.,

1. §§17, 27. §§3014, 3029 Burns 1914, §§2483, 2491 R. S. 1881. The first section referred to provides: "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: *Provided, however,* that where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors." The latter section reads as follows: "A surviving wife is entitled, except as in section seventeen excepted, to one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: *Provided, That if the husband shall have left a will, the wife may elect to take under the will instead*

of this or the foregoing provisions." It will be noticed that the former section refers to lands, which the husband died siezed of; while the latter section refers to lands of which he was seized during the marriage, but which were conveyed without the wife joining therein as the law provides. Under §17, *supra*, it has been held that the widow takes as an heir, while under §27, *supra*, she takes by reason of her marital rights. *Haggerty v. Wagner* (1897), 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; *May v. Fletcher* (1872), 40 Ind. 575; *Bowen v. Preston* (1874), 48 Ind. 367; *Fry v. Hare* (1906), 166 Ind. 415, 77 N. E. 803; *Graves v. Fligor* (1895), 140 Ind. 25, 38 N. E. 853; *McKinney v. Smith* (1886), 106 Ind. 404, 7 N. E. 3. And further, a married woman is regarded as a purchaser for a valuable consideration of all the property,

2. which accrues to her by virtue of her marriage. *Staser v. Garr, Scott & Co.* (1907), 168 Ind. 131, 79 N. E. 404; *Richardson v. Schultz* (1884), 98 Ind. 429; *Derry v. Derry* (1881), 74 Ind. 560; *Green v. Estabrook* (1907), 168 Ind. 123, 79 N. E. 373, 120 Am. St. 349.

By the act of 1875 (§3052 Burns 1914, §2494 R. S. 1881), where the inchoate interest of a married woman is not directed to be sold by the

3. judgment or barred by virtue of such sale, it becomes absolute and vests in the wife in the same manner and to the same extent as upon the death of her husband. The provisions of this act do not apply to sales of real estate upon judgments rendered prior to the taking effect of the same. It has been held that this act neither enlarged nor abridged the inchoate interest of a married woman in the lands of her husband. *Baker v. McCune* (1882), 82 Ind. 339. Prior to the taking effect of the act of 1875, *supra*, the

title to a debtor's real estate, sold at judicial sale, vested in the purchaser the whole title, subject, however, to the inchoate right of the wife in one-third thereof in the event she survives her husband. *Taylor v. Stockwell* (1879), 66 Ind. 505; *Elliott v. Cale* (1888), 113 Ind. 383, 14 N. E. 708, 16 N. E. 390; *Geisendorff v. Cobbs* (1911), 47 Ind. App. 573, 94 N. E. 236. We must therefore, look to the law in force at the time of the sale, and during the time Isaac E. Johnson held the title to the real estate in question and the construction it has received by our courts of last resort in order to ascertain the relative rights of the parties to this cause.

The facts above disclose that Margaret E. Johnson, the mother of appellees, did not join in the deed of conveyance executed by their father to John A. Heidlinger to the real estate in question. It can without hesitancy be said that if her rights as a married woman attached to the real estate during the time her husband held the record title thereto, they were unaffected by the warranty deed executed by Isaac E. Johnson to John A. Heidlinger. It will be noted that, in addition to obtaining a conveyance by warranty deed from Isaac E. Johnson, John A. Heidlinger likewise obtained a sheriff's deed based upon a decree of foreclosure of a mortgage, which antedated the deed of conveyance from Isaac E. Johnson's grantor to him, and which Isaac E. Johnson had agreed to pay as a part of the purchase money, when he took the deed of conveyance. The pivotal question is, What rights did John A. Heidlinger acquire under the sheriff's deed? When a conclusion has been reached upon this question, the burden of our labor will have been finished, as the other ques-

Stanley to him, but sold after he became the owner. Without deciding whether the diversity of the facts in the particular above related, distinguishes the case at bar from *Fowler v. Maus, supra*, there is one proposition that this case did decide, and that is from a sale upon an incumbrance, which Isaac E. Johnson agreed to pay, as a part of the purchase price, she was entitled to redeem, where she was not made a party to the suit, upon which the judgment was rendered. And so in this case, when Isaac E. Johnson took the title to the real estate here involved, he agreed to discharge the liens against the same as a part of the purchase price, and the sheriff's deed was based upon the decree of foreclosure, which he agreed to pay, and his wife was entitled to redeem from the sale after the death of her husband unless by reason of the fact that the sale was had upon the decree of foreclosure rendered before her husband purchased the real estate. It may be stated as a general proposition of law that the wife, by reason of her marital rights, may redeem from a sale of real estate had during the lifetime of her husband for purchase money, after the death of her husband, where she was not a party to the foreclosure proceedings. *Barr v. Vanalstine* (1889), 120 Ind. 590, 22 N. E. 965; *May v. Fletcher, supra*; *Warner v. Vanalstyne* (1832), 3 Paige 513; *Brenner v. Quick* (1883), 88 Ind. 546; *Frain v. Burgett* (1898), 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; *Darby v. Vinnedge* (1913), 53 Ind. App. 525, 100 N. E. 862. After Isaac E. Johnson became seized in fee simple of the real estate in question by reason of the conveyance to him by Stanley, the interest of his wife attached as an incident to the seisin of the

6. husband during marriage, and no act or conveyance by the husband without her join-

ing therein in some manner could sever, divest or extinguish her interests. *Crissom v. Moore* (1886), 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; *Frain v. Burgett, supra*; *Tiedeman, Real Prop. §121*; *Stroup v. Stroup* (1895), 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; *May v. Fletcher, supra*. On May 9, 1864, Isaac E. Johnson executed to John A. Heidlinger, as aforesaid, a warranty deed, which he placed of record in the recorder's office of Marion County, Indiana, on May 13, 1864; and upon obtaining the warranty deed, he immediately went into possession of the real estate in question. On May 28, 1864, the same real estate described in the warranty deed was sold by the sheriff of Marion County, upon the decree of foreclosure heretofore mentioned, to John A. Heidlinger, who as above disclosed, already held the title by a warranty deed. He obtained the sheriff's deed for the real estate upon the date of the sale. Before the execution of the warranty deed and the deed by the sheriff, it was arranged between Isaac E. Johnson and John A. Heidlinger, that John A. Heidlinger was to take the conveyance by warranty deed from Isaac E. Johnson, and a sheriff's deed upon the decree of foreclosure for the purpose of clearing the title. The consideration mentioned in the warranty deed was \$16,500; the deed, however, included other real estate than here involved. The consideration for the execution of the sheriff's deed was \$50. The amount paid to discharge the liens on the real estate, together with the amount paid Isaac E. Johnson, and the consideration for the sheriff's deed was the fair value of the real estate at the time. It is strenuously insisted by appellants that John A. Heidlinger had a right to enter into an agreement with his grantor whereby the real estate should be sold upon the

judgment liens by the sheriff in order to clear the title. However, there is no infirmity disclosed in the title, except the liens that were standing against the real estate at the time, and which were liquidated, and the amounts thereafter paid. Now, does this prearrangement to have the real estate sold by the sheriff, and which was finally carried out, add anything to the title John A. Heidlinger had by reason of the warranty deed he held prior to the sale by the sheriff? As far as the liens are concerned, they were not paid by reason of the sale by the sheriff, except to the extent of \$50, and from aught that the record discloses this \$50 in consideration for the sale and conveyance by the sheriff may have been applied to the costs of the action. So the liens were practically, if not entirely, paid by John A. Heidlinger personally. The record discloses no claim or outstanding title of any kind, as against the real estate in question, that could have been barred by reason of the sale by the sheriff. So the conveyance by the sheriff could serve no purpose in the light of the facts other than to extinguish Margaret E. Johnson's inchoate interest in the real estate in question.

It is admitted that Margaret E. Johnson was a person of unsound mind from 1860 to the date of her death in 1907, and there is no pretense

7. that any one was misled by her conduct, which eliminates any element of estoppel from this cause. The element of a good-faith purchaser pressed by appellants adds nothing to their position. The fact that John A. Heidlinger paid a full and fair consideration for the real estate in question, and that he believed his grantor to be a single man would not prevent the wife's inchoate interest from ripening upon the death of her husband. *Law v. Long* (1873), 41 Ind. 586;

14 Cyc 980; *Smith v. Fuller* (1908), 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; *Mason v. Deirks Lumber, etc., Co.* (1910), 94 Ark. 107, 125 S. W. 656, 26 L. R. A. (N. S.) 574; *Hunt v. Reilly* (1902), 24 R. I. 68, 52 Atl. 681, 96 Am. St. 707, 59 L. R. A. 206; *Haller v. Hawkins* (1910), 245 Ill. 492, 92 N. E. 299; *McLanahan v. Griffin* (1897), 168 Ill. 31, 48 N. E. 315; *Hilton v. Sloan* (1910), 37 Utah 359, 108 Pac. 689; *Cazier v. Hinchey* (1898), 143 Mo. 203, 44 S. W. 1052; *Hall v. Marshall* (1905), 139 Mich. 123, 102 N. W. 658, 111 Am. St. 404; *Stevens v. Wooderson* (1906), 38 Ind. App. 617, 78 N. E. 681. Section 3037 Burns 1914, §2499 R. S. 1881, provides "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property by virtue of any decree, execution or mortgage, to which she shall not be a party (except as provided otherwise by this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." The supreme court of the State of Illinois under a statute similar to the above, said in *Haller v. Hawkins, supra*, "There is no evidence that the plaintiff in error knew of the false statements in the deed and certificate of acknowledgment that the grantor was unmarried, and neither such false statements nor any other fraud of her husband, not participated in by her, could prejudice her rights of dower." The same court in *McLanahan v. Griffin, supra*, held, "There was evidence that when petitioner's husband executed the deed he said

that he was a single man. The statement was false, and petitioner did not hear it made or know of it, so that it did not affect her right to dower by estoppel or otherwise."

Our attention has been called by appellants to the fact that the decree of foreclosure upon which the sale was had was a lien against the real estate before Margaret E. Johnson's husband purchased the same. We are not unmindful that where

there is a sale on a decree of foreclosure of

8. a mortgage, that the deed relates back to the execution of the mortgage. *Bateman v. Miller* (1889), 118 Ind. 345, 21 N. E. 292;

9. *Jarrell v. Brubaker* (1898), 150 Ind. 260, 49 N. E. 1050; *Batterman v. Albright* (1890), 122 N. Y. 484, 25 N. E. 856, 19 Am. St. 510, 11 L. R. A. 800; *Van Buskirk v. Summitville Min. Co.* (1906), 38 Ind. App. 198, 78 N. E. 208. Does the sale so made by the sheriff on May 28, 1864, to John A. Heidlinger come within this doctrine? It must be kept in mind that John A. Heidlinger at the time he purchased the real estate in question and took a sheriff's deed therefor already had on record a warranty deed from Isaac E. Johnson, who was the owner in fee simple of the real estate at the time of the conveyance. It was his own land that was sold and bid in by John A. Heidlinger, and for which he took a sheriff's deed. The judgment lien, upon which the sale was had, together with all other liens upon the real estate were to be paid by John A. Heidlinger as a part of the purchase price for the real estate. "Where the complete legal title is already in the purchaser, another title obtained through a judicial sale would merge in the prior title, if it appears that the title formerly held and that acquired by the sale are held in the same right, with no intervening title in a

third person. If, however, the title so obtained was procured for the purpose of cutting off intervening title or incumbrances, and to reënforce a title then held, the subsequently acquired title will merge or be kept on foot, depending on the relation in which the purchaser stood to the judgment or sale on which the title is predicated. If the purchaser was primarily liable to pay the incumbrances on account of which the sale was made, it would seem reasonably manifest that he could build up no additional title on his own default." *Birke v. Abbott* (1885), 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474. See, also, *Bunch v. Grave* (1887), 111 Ind. 351, 12 N. E. 514; *Shanklin v. Franklin Life Ins. Co.* (1881), 77 Ind. 268; *Overturf v. Martin* (1908), 170 Ind. 308, 84 N. E. 531. In view of the liberality with which the law looks upon the inchoate interest of the wife, and in view of the facts in this cause, and in the light of the authorities, we have reached the conclusion that the sheriff's sale did not bar the wife's inchoate interest in the real estate in question, and upon the death of her husband, it ripened into an estate subject to the incumbrances that were paramount to it when her husband took the title from Esther Stanley, with the right to have the undivided two-thirds part first exhausted before resorting to her undivided one-third part thereof. The sheriff's deed to John A. Heidlinger, under the circumstances, gave him no additional title to that acquired by the warranty deed from Isaac E. Johnson. It was his duty to have paid the liens as a part of the purchase price, and he could not build up an additional title on his own default, so as to bar the wife's inchoate interest. She therefore had a right to redeem from this sale and to have her interest found as against the liens that

were superior to her title, and appellants are entitled to be subrogated to the mortgage and judgment of foreclosure, upon which the sale was had.

Appellants insist that the special finding of facts is not sustained by sufficient evidence and are contrary to law. The record discloses

10. evidence sufficient to support each finding of the court, except as to the appellees being the owners, as tenants in common with appellants of an undivided one-third part in value of a certain tract of real estate designated throughout this litigation as the four-foot strip. Before Isaac E. Johnson became the owner of the real estate in question, a part of lot 5 in block 52 in the city of Indianapolis, being $102\frac{1}{2}$ feet facing on Washington street, and bounded on the east by Senate avenue, was cut into six different parcels, upon which business rooms were to be erected, and the same extended back seventy feet. The tract at the corner of Senate avenue and Washington street was seventeen and one-half feet wide; each of the other five tracts was seventeen feet wide. To the rear of these six tracts, there was a narrow strip of ground, starting at Senate avenue, extending west $102\frac{1}{2}$ feet and four feet wide, heretofore referred to as the four-foot strip. This was intended to be used in common by the owners of the tracts contiguous thereto, and when the main tracts were conveyed from time to time, an undivided one-sixth interest in this four-foot strip was intended to go with each tract. An attempt to trace the title of this narrow strip shows that many errors occurred in attempting to convey the same, and the record in this behalf abounds in confusion. However, there is enough to show that Isaac E. Johnson had at one time, while the owner of the real estate in question,

an undivided one-sixth interest in this four-foot strip. The necessity for this four-foot strip seems to have ceased many years after the conveyance by Isaac E. Johnson to John A. Heidlinger, and the same was severed by deeds of conveyance, so that each tract was made to include that part of the four-foot strip upon which it abutted. By reason of Isaac E. Johnson being the owner of an undivided one-sixth part of the four-foot strip, his wife's inchoate interest attached thereto, and the appellees are now the owners of an undivided one-third part in value of the one-sixth of that part of the four-foot strip subject to the same conditions as the main tract. The evidence discloses that appellees are the owners of an undivided one-third part in value and appellants the owners of an undivided two-thirds part in value of the following described real estate: Beginning seventeen and one-half feet west of the southeast corner of lot 6 in square 52 in the original plat of the city of Indianapolis, thence west along Washington street seventeen feet, thence north seventy feet, thence east seventeen feet, and thence south to the place of beginning; and the evidence discloses that appellees are the owners of an undivided one-third of one-sixth, and appellants the owners of the balance of the strip of ground four feet wide by seventeen feet long, lying immediately north of the tract above described. The evidence does not support the finding that appellees are the owners of an undivided one-third part in value of the tract of real estate last above described.

In the trial court the parties embodied certain facts in what they designated as stipulation No.

- 1 as to what John A. Heidlinger would
- 11 testify if present and sworn as a witness, reserving the right to raise any ob-

jection they saw fit upon the trial to the

12. competency of any part of the same. Certain paragraphs of this stipulation were put in evidence over the objection of appellants, which they insist are erroneous. The burden of appellants' objections to the admission in evidence of the various paragraphs of the stipulation goes to the parol agreement between Isaac E. Johnson and John A. Heidlinger, as to the procuring of a sheriff's deed and the paying of judgment liens out of the purchase money for the real estate in question. At the time this agreement was found to have been entered into, Isaac E. Johnson was a grantor in possession of the real estate in question, and the general tenor of the evidence in this connection relates to the consideration, which was to be paid by John A. Heidlinger for the real estate that he was then purchasing. Documentary evidence, unobjected to, discloses that within a short time after this agreement was supposed to have been entered into, a sheriff's sale was had and the property bid in by John A. Heidlinger for the nominal sum of \$50, so there could be no error predicated upon that part of the parol testimony covered by documentary evidence unobjected to. Taking the evidence objected to as a whole, it went no further than to explain the consideration for the conveyance, in connection with the sale by the sheriff and the procuring of the deed as aforesaid, and there was no error in admitting the same.

Appellees have filed a cross assignment of error objecting to the court's conclusions of law which relate to the rents and profits of the real estate,

on the theory that the conclusions of law,

13. as stated in this particular, fail to give appellees the benefit of their share of the

rents and profits received by appellants subsequent to the time when the net amount of rents and profits had been sufficient to pay off and discharge the mortgage lien, to which appellants were entitled to be subrogated. The conclusions of law challenged by the cross assignment of error in substance holds that appellants are entitled to be subrogated to the amount paid by John A. Heidlinger on the mortgage lien, together with six per cent interest from the date of Isaac E. Johnson's death, in the sum of \$6,347; and that this amount had been fully paid by the application thereto of the net rents received by the appellants and their ancestor between the time of the death of Isaac E. Johnson and the bringing of this action. The conclusions of law in this respect are in harmony with the holding in the case of *Fowler v. Maus, supra*. The court did not err in its conclusions of law in ascertaining the amount of the rents and profits chargeable to appellants.

For error of the court in holding that appellees are the owners of an undivided one-third part of the real estate heretofore described as a strip of ground four feet wide by seventeen feet long, lying immediately north of the main tract in question, judgment is reversed, with instructions to the court below to restate its conclusions of law in conformity herewith as to said parcel of ground. In all other things the judgment of the lower court is affirmed. All costs made in this court are adjudged against appellees, and all costs made in the lower court are adjudged against appellants.

NOTE.—Reported in 108 N. E. 624. As to when election by widow may be compelled, see 92 Am. St. 695. As to the right of dower in an equity of redemption, see 12 Ann. Cas. 481; Ann. Cas. 1913 B 1310.

WACHSTETTER v. JOHNSON ET AL.

[No. 8,537. Filed May 26, 1915. Rehearing denied December 17, 1915. Transfer denied April 27, 1916.]

APPEAL.—Review.—Findings.—Reversal.—Where the evidence in a partition suit did not support a finding of the trial court as to certain interests in a portion of the real estate involved, the conclusion of law based on such finding was erroneous and necessitated a reversal.

From Marion Circuit Court (17,478); *Charles Remster*, Judge.

Action between Anna Wachstetter and Thomas E. Johnson and others. From the judgment rendered, Anna Wachstetter appeals. *Reversed in part and affirmed in part.*

Ferdinand Winter and Kealing & Hugg, for appellant.

Gavin, Gavin & Davis, for appellees.

MORAN, J.—This case from its legal aspect presents the same questions as the case of *Wachstetter v. Johnson* (1916), *ante* 659, 108 N. E. 624. On the authority of that case, this cause is decided. The evidence discloses that appellees are the owners of an undivided one-third part in value, and appellants the owners of an undivided two-thirds part in value of the following described real estate: beginning thirty-four and one-half feet west of the southeast corner of lot 6, in square 52 in the original plat of the city of Indianapolis, thence west along Washington Street, seventeen feet, thence north seventy feet, thence east seventeen feet, thence south to the place of beginning; and the evidence discloses that appellees are the owners of an undivided one-third of one-sixth, and the appellants the owners of the balance of a strip of ground four feet wide by seventeen feet long lying immediately north of the tract above

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described. The evidence does not support the finding that appellees are the owners of an undivided one-third part in value of the tract last above described; and for error of the court in holding that appellees are the owners of an undivided one-third part of the real estate heretofore described as a strip of ground four feet wide by seventeen feet long lying immediately north of the main tract in question, judgment is reversed, with instructions to the court below to restate its conclusions of law in conformity herewith, as to said parcel of ground. In all other things the judgment of the lower court is affirmed. All costs made in this court are adjudged against appellees, and all costs made in the lower court are adjudged against appellants.

NOTE.—Reported in 108 N. E. 990.

TIPTON REALTY AND ABSTRACT COMPANY v. KOKOMO STONE COMPANY ET AL.

[No. 8,731. Filed December 10, 1915. Rehearing denied February 25, 1916. Transfer denied April 28, 1916.]

1. **STATUTES.—Remedial Statutes.—Construction.**—In ascertaining the persons or classes that come within the provisions of a remedial statute, the courts apply the rule of strict construction, but in order to give effect to the statute as to those who come within its provisions it will be liberally construed. p. 687.
2. **WORDS AND PHRASES.—“Subcontractor.”**—The term “subcontractor” does not ordinarily include materialmen and will not be held to do so unless it clearly appears from the context of the act or writing in question that it was so intended. p. 687.
3. **HIGHWAYS.—Improvements.—Assignment of Estimates and Money.—Rights of Materialmen.—Statutory Provisions.**—Where the contractor for the improvement of certain highways assigned all the estimates and moneys to be paid on said improvements to a firm which agreed to furnish money for the contractor’s payroll, another firm which furnished gravel used in the construction was not entitled to have the funds retained for the payment of its claim under the act of March 4, 1911 (Acts 1911 p. 437, §§5901a, 5901b Burns 1914), passed shortly after such assignment, since §1 of said act provides for the retention of funds for subcontractors and laborers

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only, and while the provisions of §2 include materialmen, it applies only to contracts awarded after the passage of the act, and there is nothing to warrant the construction that the legislature intended the benefits of §1 to extend to materialmen. p. 688.

4. HIGHWAYS.—*Improvement.—Rights of Materialmen.*—One furnishing gravel used in the improvement of highways is not entitled to preference in the allowance of his claim, independently of statute, as against one who furnished money for the contractor's pay roll under an assignment by the contractor of the estimates and moneys to be paid for such improvement. p. 689.

From Howard Circuit Court; *Wm. C. Purdum*, Judge.

Proceedings for the improvement of certain highways. From a judgment of the circuit court in favor of the Kokomo Stone Company and others, the Tipton Realty and Abstract Company appeals. *Reversed.*

Gifford & Gifford and Bell, Kirkpatrick & Voorhis, for appellant.

E. A. Mock and Blackledge, Wolf & Barnes, for appellees.

FELT, P. J.—In March, 1910, the firm of Davis & Booher, duly entered into a written contract with the board of commissioners of Howard County, Indiana, to construct the Stephen Lineback free gravel road for \$5,689. In May of the same year the same parties contracted for the construction of the Frank Jackson free gravel road for the sum of \$6,940. In September of the same year, the same parties contracted for the construction of the A. E. Hoon free gravel road for the sum of \$6,363. By the terms of the contract, Davis & Booher agreed to construct the roads according to the profile, plans and specifications adopted for each of the roads and to "pay for all labor and material that shall have been furnished either to him or to any subcontractor, agent or superintendent under him". On May 27, 1911, Davis & Booher en-

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tered into a contract with appellant, "Tipton Realty and Abstract Co.", a partnership composed of Cleon W. Mount, Benjamin F. Leavill, Nicholas Martz and Peter O. Duncan, by the terms of which contract appellant agreed to furnish Davis & Booher the money for biweekly pay rolls for the construction of said roads, in consideration of which they assigned to appellant "all the estimates and moneys to be paid on said improvements" and authorized appellant to receive the money and the county officials to draw the warrants therefor in favor of appellant. The contract further provided that, on completion of the roads and payment of all costs occasioned thereby including \$2 per day for time actually employed on the work by the contractors, appellant was to receive one-third and Davis & Booher two-thirds of the balance due on the contracts.

On May 27, 1911, Davis & Booher executed an instrument in writing directed to the board of commissioners and auditor of Howard County, Indiana, which recites that, "you are hereby notified that we have sold, assigned and transferred to the Tipton Realty and Abstract Co. all the estimates and moneys that will be due us on the following highway improvements," naming them, "and you are hereby empowered and requested to draw warrants and pay all moneys and estimates that will be due us on said roads in favor of said Tipton Realty and Abstract Co. for which this shall be your warrant." This instrument was filed in the auditor's office of Howard County, Indiana, on June 2, 1911. At the time the claims were presented out of which this suit arose, \$8,392 was in the treasury of Howard County to be used in payment of the balance due for the construction of the aforesaid gravel roads. Of this amount

\$4,023 was then earned and payable and appellant sought to have the same paid to it as assignee of Davis & Booher, to reimburse it for money advanced in pursuance of its contract with them.

The appellees filed claims with the auditor, aggregating \$2,387 for gravel furnished from July to December, 1911, and in January, 1912, for the construction of the roads, and sought to have their claims declared prior to the claim of appellant and paid in full from the available funds. The money available was insufficient to pay appellees' claims in full and the sum demanded by appellant under its assignment from the contractors on money furnished to pay the labor bills. The board of commissioners allowed the claims of appellees in full and awarded the residue of the available funds to appellant, from which action appellant appealed to the Howard Circuit Court. Appellant then filed an amended answer to the several claims of appellees in which it set up in detail the facts and dates relating to the several contracts, transactions and claims of appellees. It also averred in substance that Davis & Booher on September 7, 1910, duly contracted for the construction of the Hoon, Lineback and Jackson free gravel roads and to secure the performance of such contract executed a bond with good and sufficient surety, payable to the State of Indiana in the sum of \$44,232, by which the obligors bound themselves to construct the roads according to profiles, plans and specifications and to pay all labor and material bills of every kind and character incurred in the construction of the roads. It also averred the assignment to appellant of the estimates and money that should become due on the contract and asserted the right to have its claim allowed for money advanced by virtue of such assignment in

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preference to the claims of appellees for material furnished after the estimates and money due the contractors were so assigned to it; that it had advanced more than \$18,000 which had been used in paying labor and other bills in the construction of said roads. The claims of appellees were treated as refiled in the circuit court and were consolidated. The special answer of appellant was made to apply to each of the claims of appellees. The trial court found in favor of appellees; that their several claims ought to be paid in full from the available funds in preference to appellant's claim, and accordingly rendered judgment for the aggregate amount due appellees in the sum of \$2,687. No judgment was rendered as to the residue of the available funds in the treasury of the county to be applied in payment of bills for the construction of the roads. The error assigned and relied on for reversal of the judgment is the overruling of appellant's motion for a new trial, which was asked on the ground (1) that the decision of the court is not sustained by sufficient evidence and (2) is contrary to law.

Appellees claim the right as materialmen to prior payment of their several claims from the available funds by virtue of the act of March 4, 1911, declaring an emergency for the immediate taking effect of the act. Acts 1911 p. 437, §§5901a, 5901b Burns 1914. Appellant claims the act of 1911 does not apply to materialmen who claim under contracts entered into prior to the enactment of the statute; that appellees have no right to priority over appellant to whom the funds were assigned prior to the filing of their claims; that materialmen are not included in §1 of the act in question; that the term "subcontractor" as used in §1 does not include materialmen. The act

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of 1911, *supra*, provides in substance as follows: "That all boards of trustees of state institutions and commissioners appointed for the building of state buildings and all boards of county commissioners, township trustees or any other county or township boards authorized to contract for any public building or public improvement, and officers and boards authorized by the state, county or township to distribute funds and pay contractors for public buildings or any public improvements where contracts have or may hereafter be entered into through such officers, boards of commissioners for the erection of public buildings or any public improvement of the state, county or township or the repair thereof, such officers, boards, commissioners or trustees shall withhold full payment to the contractor until such contractor has paid to the sub-contractors or laborers employed in such construction, all bills due and owing the same; *Provided*, There is sufficient sum owing to the contractor to pay all such bills, and if there is not a sufficient amount owing to such contractor on such contract to pay all of such bills, then the sum owing on said contract shall be prorated in payment of all such bills; *Provided*, Such sub-contractor or sub-contractors or laborers shall file with the trustees or board or commission their claim within thirty days from the completion of the work * * *." §5901a Burns 1914, Acts 1911 p. 437. "That after the passage of this act all contracts which are awarded to contractors for the construction of state buildings, or any county or township buildings or other public improvements provisions shall be made in the contract for the payment of labor and sub-contractors by withholding by the agents of the funds sufficient from the contract price to pay for labor and material and sub-

contractors, and the bond given by the contractor for the construction and erection of the building or buildings or public improvement or the repair thereof shall be so conditioned that the sureties thereon shall be liable for labor, material, and to sub-contractors; *Provided, however*, That laborers, materialmen and sub-contractors, shall file their claims with the agents of the state, county or township, within thirty days after the labor is performed or the material furnished." §5901b Burns 1914, Acts 1911 p. 437. "This act shall not be construed as conflicting with any other laws for the protection of labor, sub-contractors or materialmen, but is supplemental thereto." §5901c Burns 1914, Acts 1911 p. 437.

In ascertaining the persons or classes that come within the provisions of such remedial statutes, the courts apply the rule of strict construction, but in order to give effect to the statute

1. as to those who come within its provisions it will be liberally construed. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 17, 87, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Ryan v. State* (1910), 174 Ind. 468, 474, 92 N. E. 340, Ann. Cas. 1912 D 1341; *Deal v. Plass* (1915), 59 Ind. App. 185, 109 N. E. 51; *Rader v. A. J. Barrett Co.* (1915), 59 Ind. App. 27, 108 N. E. 883. The term "sub-contractor" does not ordinarily include materialmen and will not be held to do so unless it
2. clearly appears from the context of the act or writing in question that it was so intended. *Farmers Loan, etc., Co. v. Canada, etc., R. Co.* (1891), 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; *Caulfield v. Polk* (1896), 17 Ind. App. 429, 435, 46 N. E. 932; *Raynes v. Kokomo Ladder, etc., Co.* (1899), 153 Ind. 315, 317, 54 N. E. 1061;

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Staffon v. Lyon (1895), 104 Mich. 249, 251, 62 N. W. 354; *Avery v. Board, etc.* (1888), 71 Mich. 538, 39 N. W. 742, 745; *Pitts & Cook v. Bomar* (1861), 33 Ga. 96, 97; *Merriman v. Jones* (1890), 43 Minn. 29, 44 N. W. 526, 527; *Duncan v. Bateman* (1851), 23 Ark. 327, 328, 79 Am. Dec. 109. The foregoing conclusion is not in conflict with the conclusion reached in *Moore-Mansfield, etc., Co. v. Indianapolis, etc., R. Co.* (1913), 179 Ind. 356, 357, 390, 101 N. E. 296, 44 L. R. A. (N. S.), 816, Ann. Cas. 1915 D. 917, where the liberal rule of construction was applied in determining the sufficiency of the title of the mechanics' liens act of 1883 to include contractors and subcontractors. Acts 1883 p. 140, §7255 Burns 1894.

If appellees derive any benefit from the statute it must be by reason of §1 which deals with officers and boards "authorized to contract for * * *

public improvement * * * to distribute

3 funds and pay contractors for public buildings or any public improvement *where contracts have or may hereafter be entered into through such officers.*" Two classes for whom funds may be retained are mentioned four times in §1 and each time are designated as *subcontractors* and *laborers*. Section 1 which deals with contracts entered into before as well as after the passage of the act, provides a remedy for subcontractors and laborers that may be invoked by such persons independent of the provisions of §2. Section 2 is also remedial and its provisions apply to three classes, viz., subcontractors, laborers and materialmen. The section applies only to contracts awarded after the passage of the act and provides for the security of the classes named by stipulations to be inserted in the contract and bond of the contractor requiring the funds to be withheld for their benefit and expressly stipulating for the liability of sureties on

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the bond "for labor, material and subcontractors."

Each section fully covers the subject with which it undertakes to deal and neither is ambiguous. Each is consistent throughout its several provisions and leaves no room for adding another class, materialmen, to those enumerated in §1, by construction or inference. The use of the phrase "materialmen" in §2 shows that it was not omitted from the first by inadvertence, or on the theory that materialmen were included in one of the classes designated in the section. If the latter suggestion were correct it would apply with equal force to the second section and there would have been no necessity for mentioning materialmen in it to enable them to claim its benefits. The express mention of materialmen in §2, if it has any bearing on the question at all, tends to show that materialmen were intentionally omitted from §1. Why they were not included in §1 was a question for the legislature and it is not our duty or province to undertake to answer the question in the face of the clear and unambiguous language employed in each of the sections. Neither are we authorized to enlarge the section by supplying the omitted class where as here the provisions are clear and each section may be given definite effect as enacted by the legislature. In such case it is the duty of the court to give effect to the statute as written and to do otherwise would be to enter upon an unwarranted field of judicial legislation. Appellees also contend that independent of the statute they are entitled to the preference given them by the trial court. It is not disputed that appellant

4. furnished money to pay labor and other bills incurred in the construction of the roads to an amount in excess of the sum for which it

asked an allowance. We see no merit in appellees' contention and find no sufficient reason for the preference of appellees' claims over that of appellant either under, or independent of, the statute.

The motion to dismiss the appeal has been considered and is overruled. Judgment reversed with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 110 N. E. 688. As to lien of materialmen, see 79 Am. Dec. 268. As to the right of subcontractor to protection of statute giving liens to "laborers", "mechanics", "workmen" and the like, see 30 L. R. A. (N. S.) 85. As to priority as between mechanic's lien claimant and assignee of claim due contractor, see 19 Ann. Cas. 435; Ann. Cas. 1913 D 514.

VOORHEES v. CRAGUN.

[No. 8,977. Filed May 10, 1916.]

1. FRAUD.—*Deceit.*—*Nonessential Representations.*—In an action for fraud on plaintiff in the sale to him of certain corporate stock, where the complaint proceeded on the theory that representations by defendant as to the undesirability of retaining in the company the man whose stock was purchased were made for the purpose only of getting plaintiff in a frame of mind to consider the purchase of such stock, thus rendering easier of accomplishment defendant's sale to plaintiff of such stock at par after he, the defendant, had arranged for its purchase from the owner at much less than par, the fact that the representations as to the owner of such stock were true was of no avail to defendant, since the falsity thereof was not essential to plaintiff's cause of action. p. 696.
2. FRAUD.—*False Representations.*—*Basis of Action.*—Representations relied upon as the basis of an action for fraud must relate to a material existing fact, and mere opinions as to value, or representations or promises as to what one can or will do in the future will not furnish the basis for such an action. p. 696.
3. FRAUD.—*Misrepresenting Price of Corporate Stock.*—Where defendant by falsely representing that in purchasing eighty-one shares of corporate stock he had to pay \$100 a share, when in fact he had arranged for its purchase for \$6,000, by reason of which representation plaintiff paid defendant \$8,000 for eighty shares, defendant was liable to plaintiff for the difference, since a person who arranges to sell to another property at cost price to him, and by false representations as to such price induces the purchaser to

pay an excess, is liable to the purchaser for the difference even though the property may be worth the amount paid by the latter. p. 697.

4. **FRAUD.—Misrepresentations.—Damages.**—Where false statements as to cost of property, made in representing its value, are such as to constitute actionable fraud, the measure of damages is the difference between the actual value and the value as represented; but where property is sold at what is represented to be its cost to the seller, so that the cost price is a material part of the agreement, any sum paid above such cost price would be the measure of damages. p. 699.
5. **FRAUD.—Misrepresentations.—Failure to Investigate.**—Where defendant, in inducing plaintiff to purchase stock held by the superintendent of a corporation in which they were each interested, told plaintiff that only he, the defendant, could negotiate the purchase, that it would not do to let such superintendent know that any one other than defendant was interested in such purchase, which defendant represented would be made at par, etc., when as a matter of fact defendant had already arranged for its purchase below par, the contention by defendant, in an action against him by plaintiff to recover for the fraud, that plaintiff should have investigated before buying and paying for the stock, was unavailable. p. 700.
6. **FRAUD.—Defenses.—Laches.**—While the right to prosecute an action may be barred if plaintiff has been guilty of such laches in bringing same as to work an equitable estoppel, where the action is one at law to recover damages for fraud, and the situation of the parties has not changed, and the interest of no third party has intervened, a defense of laches founded on mere delay can not prevail. p. 701.
7. **TRIAL.—Depositions.—Motion to Suppress.**—Where the notice for the taking of a deposition is defective, and the defect appears upon its face, objection should be taken by a motion to suppress the deposition before entering on the trial. p. 702.
8. **DEPOSITIONS.—Defective Notice.—Waiver.**—A party by attending the taking of a deposition and cross-examining the witness waives a defect in the notice. p. 702.
9. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—Error, if any, in admitting in evidence certain telegrams in support of a motion to strike out an affidavit denying notice of the taking of a certain deposition offered in evidence, was cured by the overruling of such motion. p. 702.
10. **FRAUD.—Pleading.—Amendment.**—In an action for fraud in the sale of certain corporate stock, there was no error in permitting plaintiff, at the conclusion of the evidence, to amend the complaint to show that the purchase was in writing, since the complaint was based on tort and its sufficiency was not affected by the amendment. p. 703.

11. PLEADING.—*Complaint.*—*Waiver of Defects.*—The sufficiency of a complaint is waived by failing to demur thereto. p. 703.
12. PLEADING.—*Proof.*—*Variance.*—Where the averments of the complaint in an action for fraud in the sale of certain corporate stock were such that evidence of either a written or verbal sale was admissible, there was no variance upon proof that the transaction was in writing. p. 703.

From White Circuit Court; *James P. Wason*, Judge.

Action by Strange N. Cragun against Richard D. Voorhees. From a judgment for plaintiff, the defendant appeals. *Affirmed*

Charles R. Pollard and Sills & Sills, for appellant.
E. B. Sellers and S. R. Artman, for appellee.

HOTTEL, J.—For convenience and brevity appellee and appellant will be referred to herein as A and B, respectively. This is an appeal from a judgment in A's favor for \$2,477.20 and interest from September 22, 1913, in a suit brought by him against B to recover damages alleged to have resulted from the fraud of B in connection with a sale made by him to A of 80 shares of stock in the "Dairy Cream Separator Company". The complaint is in one paragraph and the averments thereof, necessary to an intelligent disposition of the questions presented by the appeal are substantially as follows: On July 18, 1907, the "Dairy Queen Manufacturing Company", a corporation, was engaged in the manufacture and sale of cream separators at the town of Flora, Indiana. On said day a new corporation, designated "The Dairy Cream Separator Company" was organized with a capital stock of \$65,000, divided into 650 shares of \$100 each. This latter corporation was organized for the purpose of taking over the former and enlarging it and relocating it at Lebanon, Indiana. B and one

Edward F. Hedderich, hereinafter referred to as H, were stockholders in the former company, resided in said town of Flora and took stock in the new company, B taking 122 shares and H, 81 shares. A took 75 shares in the new corporation and A and B were elected directors thereof. A was chosen president and B vice president and continued to hold such offices for more than three years. H was selected as superintendent of the factory of the new corporation. About the time of the organization of the new corporation, B learned that H's 81 shares of stock could be purchased for \$6,000, and he thereupon conceived the intention of cheating and defrauding A and to such end approached and represented to A that the business of the new company would not, and could not, succeed with H as superintendent of the factory; that he, B, personally knew H and knew him to be visionary and impracticable; that his holding the position of superintendent was a menace to the success of the business of the corporation; that such representations were made by B for the purpose of arousing the interest of A and with the intent of putting him in a frame of mind to purchase additional stock in such corporation; that B cautioned A to treat said information as confidential and not to disclose it to the other directors of such corporation; that B further represented to A that in order to get rid of H and prevent him from becoming superintendent of their factory it was advisable to purchase his stock, and then well knowing that he could purchase such stock for \$6,000, falsely and fraudulently represented to A that it could be purchased at par, viz., \$8,100 and no less, and that he alone could purchase it for such sum, and proposed to A that he, A, authorize him, B, to purchase such stock at

and for such price; that relying on B's representations as true, A promised to take such matter under consideration and advisement; that soon thereafter B still intending to cheat and swindle A, further represented to him that he had a conference with H and had arranged to purchase his 81 shares of stock at \$100 a share, and again represented to A that it was highly important to purchase such stock and eliminate H as a stockholder, and as said superintendent; that it was impossible for such corporation to succeed with H as superintendent because of his impracticable and visionary character; that at the time of making these latter representations B *had then arranged with H to purchase his said stock for \$6,000*, and with the intent to wrong and defraud A concealed such fact from him, and *falsely represented that he had arranged to purchase such stock at and for \$100 per share and no less*; that he alone could purchase the stock at that price; that H did not know that he, B, was acting in behalf of anyone else in making such purchase, but believed that he was purchasing such stock for himself, personally, and that he, B, did not want H to know that the purchase of such stock was for anyone else; that if B became aware that A was trying to purchase such stock for someone else the purchase could not be effected; that he, B, could not make such purchase unless he, A, would purchase 81 shares of stock from him, B, and that if A would purchase his stock he would sell it to him at the same price for which he was buying it from H, viz., \$100 a share; that A greatly desired the success of such new corporation and did not know that any of said representations made by B were false but believed all of said representations, both as to the necessity for eliminating H as a stockholder of such new corporation and as the superin-

tendent of its factory in order to make the business of such corporation a success, and said representations as to B's arrangement for the purchase of the stock of H and the arrangement as to the price to be paid therefor, and believed that all of such representations were made by B with a good intent and an honest purpose and with a view to the success of such new corporation; that so relying on such representation and on account of his reliance thereon, A on October 18, 1907, in good faith, by a written contract executed by himself and B, purchased of B 80 shares of B's stock at and for the price of \$8,000; that if he, A, had known that B had arranged to purchase from H his 81 shares at \$6,000, he would not have purchased B's stock at \$100 a share; that each and all of the representations made by B were false and were known by him to be false when made, and were made for the purpose of defrauding A out of the sum of \$2,000 and for no other purpose, etc.

The errors assigned and relied on for reversal are: (1) the overruling of appellant's motion for a new trial; (2) the overruling of his motion that the submission of the cause be set aside and that he be granted leave to file a demurrer to the complaint as amended. The motion for new trial contains numerous grounds, many of which are waived and will not be considered there being no reference to them in B's brief. B first insists that the representations on which A relies as furnishing the basis for his recovery, as disclosed by the complaint and the evidence, relate to the price which B *was to pay* for H's stock and not representations of any material *existing* fact or facts, and hence that such representations, though false, are not actionable.

The sufficiency of the complaint was not challenged below and hence our consideration of the

questions suggested must be from the standpoint of the evidence. However, there was evi-

1. dence supporting or tending to support each of the essential averments of the complaint above indicated, and hence such averments, for the purposes of the question suggested, may be treated as statements of the facts disclosed by the evidence. It should be stated, however, in this connection that B insists that the evidence shows without contradiction that H was theoretical and impractical and that B's representations in this respect were true. Assuming that this is correct, it is not of controlling influence. The complaint proceeds on the theory that the representations in such respect were made for the purpose only of getting A in a frame of mind to consider the purchase of H's stock and this, being true, B's desires and purposes in the matter of the real fraud intended to be perpetrated, viz., the sale to A of H's stock, would have been rendered easier of accomplishment if in fact A knew and recognized the truth of B's said representations as to H. The falsity of such representations therefore, though alleged in the complaint, was not essential to A's cause of action, and hence proof thereof was not necessary

Going back to the question or legal proposition, above indicated as the one for which B contends, it may be conceded that, generally speaking,

2. representations in order to furnish the basis of an action for fraud on account thereof must relate to a material existing fact, and that mere opinions as to value or representations or promises as to what one can or will do in the future will not furnish the basis for such an action. *Culley v. Jones* (1905), 164 Ind. 168, 171, 174, 73 N. E. 94, and cases cited; *Smith v. Parker* (1897), 148

Ind. 127, 133, 45 N. E. 770; *Judy v. Jester* (1913), 53 Ind. App. 74, 86, 100 N. E. 15; *Merchants Nat. Bank v. Nees* (1916), 62 Ind. App. —, 110 N. E. 73, 112 N. E. 904; *Neidefer v. Chastain* (1880), 71 Ind. 363, 36 Am. Rep. 198; *Cooper v. Schlesinger* (1884), 111 U. S. 148, 153, 4 Sup. Ct. 360, 28 L. Ed. 382, 384. B makes his mistake in assuming that A's right to recover under the issues and the evidence is based on the misrepresentation of what he, B,

3. could purchase H's stock for. It seems clear to us that the averments of the complaint indicated, *supra*, show an entirely different theory, viz., that the action is founded on the false representations made by B in the purchase of such stock, as to the actual existing agreement and understanding he, B, had with H as to the price which he was to pay for such stock. In support of such averments and theory, there was evidence tending to show that B after convincing A that the success of their new corporation depended on getting rid of H as superintendent, then suggested that this could be done by purchasing H's stock, and in response to the suggestion of A that the purchase be taken up with the board of directors of the corporation, B represented that the purchase must be made secretly; that he believed he could purchase the stock from H at par but for no less; that A then suggested to B that he, B, purchase the stock, to which B replied that he could not do so because he was not financially able, but that he was the only person who could negotiate the purchase; that A then requested B to take the matter up with H and ascertain whether his stock could be purchased and if so upon what terms and to report the result of his negotiations to A; that a few days later B reported to A that he *had seen* H (not that he would see him) and *had discussed* with him the

purchase of his stock; that he "*had ascertained*" from H that his stock could be bought at par and no less; that he "*had arranged*" (not that he would arrange) for the purchase of H's stock at par. Upon these representations A told B to have the stock transferred to him, A, and he, A, would pay for it. B then suggested in effect that it would not do to have H transfer the stock directly to A; that the deal could not be effected in that way; that H must not know that anyone had anything to do with the purchase, other than B; that if H knew anyone else was interested he would refuse to sell; that in order to consummate the deal he, B, would transfer 80 shares of his own stock to A at the price he had arranged to pay H and would then have H transfer his stock directly to him, B. Upon these representations and with such understanding A entered into a contract with B under which A purchased and paid to B the sum of \$8,000 for 80 shares of said stock. In other words, the trial court was warranted in finding, under the averments of the complaint and the evidence offered in support thereof, that the purchase of stock, here involved, was in effect a purchase by A from H; that in making such purchase A made B his representative and agent in the negotiations and consummation thereof, and that B falsely and fraudulently represented to A that in purchasing such stock he had to pay H \$100 a share therefor, when in fact he arranged to purchase the 81 shares for \$6,000. It follows that the case is not controlled by the cases relied on by appellant and those cited, *supra*, but is controlled by that class of cases which announce the following doctrine: A person who agrees to sell to another property at cost price to him and, by false representations as to such cost price, induces the purchaser to pay a

price in excess of such cost price is liable to the purchaser for the difference between the actual cost price and the amount paid, even though the property may be worth the amount paid, or more. In such a case the purchaser is entitled to "all the profits of his purchase and contract as he made it, and it is no answer to his action to say, that though the representation was false, yet the actual value of the thing sold is equal to what such false representation induced him to pay for it." *Pendergast v. Reed* (1868), 29 Md. 398, 404, 96 Am. Dec. 539. See, also, *Bergeron v. Miles* (1894), 88 Wis. 397, 60 N. W. 783; *Teachout v. Van Hoesen* (1888), 76 Iowa 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. 206; *Johnson v. Gavitt* (1901), 114 Iowa 183, 86 N. W. 256; *Grinnell v. Hill* (1905), 1 Cal. App. 492, 82 Pac. 445; *Elerick v. Reid* (1895), 54 Kan. 579, 38 Pac. 814; *Blacks v. Catlett* (1823), 3 Littell (Ky.) 140; *Green v. Bryant* (1847), 2 Ga. 66; *Kilgore v. Bruce* (1896), 166 Mass. 136, 44 N. E. 108; *McFadden v. Robison* (1870), 35 Ind. 24; *Miller v. Buchanan* (1894), 10 Ind. App. 474, 37 N. E. 187, 38 N. E. 56; *Kohl v. Taylor* (1911), 62 Wash. 678, 114 Pac. 874, 35 L. R. A. (N. S.) 174, 182, note; *Warren v. Miller* (1904), 99 N. W. (Iowa) 127; *Hughes v. Lockington* (1906), 221 Ill. 571, 77 N. E. 1105; *McLain v. Parker* (1910), 229 Mo. 68, 129 S. W. 500.

B's second contention is, that the evidence fails to show that appellee was damaged because there is no evidence to show the difference between

4. the actual value of said stock and the value thereof if it had been as represented. It is the law that false statements as to the cost of property made in representing its value may, in certain instances, constitute actionable fraud and that in such cases the measure of damages is

that indicated by appellant. *Ohlwine v. Pfaffman* (1913), 52 Ind. App. 357, 100 N. E. 777; *New v. Jackson* (1912), 50 Ind. App. 120, 95 N. E. 328; *Grover v. Cavanagh* (1907), 40 Ind. App. 340, 82 N. E. 104; *Beck v. Goar* (1913), 180 Ind. 81, 100 N. E. 1; *Judy v. Jester, supra*; *Boltz v. O'Conner* (1910), 45 Ind. App. 178, 90 N. E. 496; *Hulett v. Kennedy* (1891), 4 Ind. App. 33, 30 N. E. 310. But the case at bar, for the reasons already indicated, does not fall within this line of cases but is controlled by the principle first announced and the cases there cited. In the instant case the agreement between B and A was to the effect that A should pay for the stock in question the price paid to H for such stock, and hence the cost price was made a material and essential part of the agreement and any sum paid above that amount on account of B's misrepresentation of such cost price would be the measure of A's damage resulting from such misrepresentations. *Bergeron v. Miles, supra*; *Johnson v. Gavitt, supra*; *Pendergast v. Reed, supra*; *Kilgore v. Bruce, supra*; *Blacks v. Catlett, supra*.

It is next insisted by B that A had no right to rely on his representations, but that A should have investigated for himself before buying and

5. paying for said stock. This contention is answered by the averments of the complaint and the evidence in support thereof, to the effect that B told A that he alone could negotiate the purchase of H's stock; that it would not do to let H know that anyone else was interested in such purchase, and the further averments of the complaint showing the mutual interest of A and B in the success of the corporation in which they each were stockholders, directors and officers, and that with the view of furthering the interests and in-

sureing the success of such corporation A trusted B to represent him and negotiate and consummate such purchase. *Kohl v. Taylor, supra*; *Dorr v. Cory* (1899), 108 Iowa 725, 732, 733, 78 N. W. 682; *Teachout v. Van Hoesen, supra*; *Culley v. Jones* (1905), 164 Ind. 168, 171, 73 N. E. 94, and cases above cited, affirming the proposition that "a contracting party may rely on the express statement of an existing fact, the truth of which is unknown to him, but which is asserted by the other contracting party, as a basis for an agreement."

It is contended that A's delay in filing his suit is such laches as should bar him from recovering.

This contention can not be upheld. While

6. there may be cases where the laches of a party may be of such "character, and under such circumstances, as will bar his right to prosecute his action, in less time than that fixed by the statute of limitations, this is so only in cases where the laches are of such a character and under such circumstances as to work an equitable estoppel." *Sherer v. Ingberman* (1887), 110 Ind. 428, 433, 11 N. E. 8, 12 N. E. 304, and cases cited. Where, as in this case, the action is one at law to recover damages for fraud, and the situation of the parties has not changed, and the interest of no innocent third party has intervened, a defense of laches founded upon mere delay can not avail, but the action may be prosecuted at any time within the period prescribed by the statute of limitations. *Koons v. Blanton* (1892), 129 Ind. 383, 387, 389, 27 N. E. 334; *Citizens Nat. Bank v. Judy* (1896), 146 Ind. 322, 43 N. E. 259; 2 Pomeroy, Eq. Jurisp. §817.

B also complains of the action of the trial court in permitting the deposition of Benjamin E. Gregory

to be introduced in evidence on the ground

7. that the notice for the taking thereof was defective. The defect suggested, being one which appeared on the face of the notice attached to the deposition, should have been presented to the trial court by a motion to suppress the deposition before entering on the trial of the case. No such motion was made. §455 Burns 1914, §439 R. S. 1881; *Pape v. Wright* (1889), 116 Ind. 502, 19 N. E. 459; *Cohen v. Reichman* (1913), 55 Ind. App. 164, 102 N. E. 284. B attended the taking of such deposition and cross-examined the witness. He thereby waived such defect in
8. the notice. *Prather v. Pritchard* (1866), 26 Ind. 65, 67; *Long v. Straus* (1890), 124 Ind. 84, 24 N. E. 664.

It is insisted that the court erred in admitting in evidence certain telegrams. Such telegrams were not admitted on the issues of the case,

9. but were offered, as stated in B's brief, in support of a motion by A to strike out certain affidavits made by B's attorneys to the effect that no notice had been served on them in connection with the taking of one of the depositions offered in evidence by A. The court overruled A's motion in support of which such telegrams were offered and admitted in evidence and hence cured, or prevented, any harm which might otherwise have resulted to B from the admission of such telegrams. The ruling on the motion in support of which the telegrams were offered was favorable to B and he has no exception thereto and hence no ground on which to predicate the error relied on. *Taylor v. Taylor* (1910), 174 Ind. 670, 683, 93 N. E. 9; *Guthiel v. Dow* (1912), 177 Ind. 149, 151, 97 N. E. 426.

Upon the conclusion of the evidence the trial

court permitted A to amend his complaint to conform to the proof by inserting an averment

10. to the effect that the purchase by him of the 80 shares of stock in question was in writing executed by the parties herein. Thereupon B filed a written motion asking that the

11. submission of the case be set aside and that he be permitted to file a demurrer to the amended complaint. Such motion was overruled and an exception thereto saved by B. This ruling is assigned as error and urged as a ground for reversal. B in the first instance, waived all objections to the sufficiency of the complaint by filing his denial and proceeding to trial without demurring thereto. Acts 1911 p. 415, §§344, 348 Burns 1914. *Akron Milling Co. v. Leiter* (1914), 57 Ind. App. 394, 107 N. E. 99. The amendment permitted did not in any way affect the question of the sufficiency of the complaint. The complaint was based on tort and not on the contract to purchase the stock and hence it was not necessary that the averment therein in relation to such contract should state whether it was written or verbal.

Under the averments of the complaint before

12. the amendment either a verbal or a written contract was admissible and proper, and hence there was no variance between the proof and such averment, and such amendment was therefore entirely needless and harmless. *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335, 341, 342, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Pittsburgh, etc., R. Co. v. Higgs* (1906), 165 Ind. 694, 702, 705, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Siegmund v. Kellogg-Mackay-Cameron Co.* (1906), 38 Ind. App. 95, 98, 77 N. E. 1096; *Breach v. Huntsman* (1908), 42 Ind. App. 205, 210, 211, 85 N. E. 523.

Leavell v. Doney—61 Ind. App. 704.

Finding no reversible error in the record the judgment below is affirmed.

NOTE.—Reported in 112 N. E. 826. As to carelessness as bar to relief from fraud, see 32 Am. St. 384. As to misrepresentation by the vendor of price paid for property as actionable deceit, see 8 Ann. Cas. 1062.

MASON v. NEFF ET AL

[No. 8,952. Filed February 23, 1916.]

From Pulaski Circuit Court; *Francis J. Vurpillat*, Judge.

W. Masson, for appellant.

Eugene C. Miller, for appellee.

From the Pulaski Circuit Court.

PER CURIAM.—Judgment affirmed.

LEAVELL ET AL v. DONEY ET AL.

[No. 8,593. Filed June 25, 1915. Rehearing denied February 18, 1916. Transfer denied April 6, 1916.]

From Laporte Circuit Court; *James F. Gallaher*, Judge.

Action by Jennie Doney and others against Thomas J. Leavell and others. From a judgment for plaintiffs, the defendants appeal. *Reversed*.

Hickey & Wolfe, for appellants.

Weir & Worden, for appellees.

HOTTEL, J.—This is an action begun by appellees to quiet title to certain real estate in Laporte County. The land in controversy lies along the Kankakee River, between the meander line and the channel of the river. The appellees Jennie Doney and Viola Doney, who were the plaintiffs below, claim title to such real estate by reason of their ownership of the lots and tracts of land abutting on the meander line of such river, under the doctrine of riparian ownership, while the appellants claim title by purchase from the State.

There was a trial by the court and a special finding of facts and conclusions of law in favor of appellees. Appellants' motion for a new trial was overruled and judgment rendered on the finding. The errors assigned and relied on for reversal challenge the ruling on the motion for new trial and the court's conclusion of law No. 1. The conclusion of law is as follows: "That the law is with the

plaintiffs; that they are the legal owners in fee simple of the real estate described in the complaint, and are entitled to have their title to the same quieted as against the defendants."

The facts found by the court show that appellants' claim of title to the land in controversy is substantially the same as that of the appellant in the case of *State v. Tuesburg Land Co.* (1916), *ante* 555, 109 N. E. 530, 111 N. E. 342, and that the law announced as applicable in that case is applicable and controlling in this case. The law as there announced authorizes and requires a reversal of the instant case and a restatement by the trial court of its conclusions of law. On the authority of that case the judgment below is reversed with instructions to the trial court to restate its conclusions of law in accord with the opinion on which this reversal is based and, to render judgment accordingly.

Shea, C. J., Ibach, P. J., and Moran, Felt, JJ., concur. Caldwell, J., not participating.

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[NOTE.—The citation *Miami County Bank v. State, ex rel.*, 260, 374 (6) indicates that the case begins on page 260, the point cited is on page 374, and that such point is numbered 6 in the margin.—REPORTER.]

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Grim v. Johns, 514, 518 (1).
2. *Defeating Acquired Title.—Estoppel.*—Where one had acquired title by adverse possession to a strip between the platted line of his lot and a fence, his subsequent agreement to move the fence to the original lot line, not having been acted on, and no money having been expended on the faith of it, did not estop him from claiming the strip.
Grim v. Johns, 514, 519 (2).

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I. APPELLATE JURISDICTION.

1. *Findings of Juvenile Court.—Form.—Sufficiency.*—The statute (§1635 Burns 1914, Acts 1907 p. 221) permits a less formal and technical procedure in the taking of appeals from the juvenile court than is customary in other proceedings; hence special findings from that court, though prefaced by the statement that "the evidence of the State showed the following facts", followed by findings of fact, including the fact that defendant had invited a boy under the age of sixteen years into his saloon, gave him beer and permitted him to remain therein, were not objectionable as not being findings of facts but merely a statement of what was shown by the evidence on one side and, although the use of the words "evidence of the State" is to be condemned, the findings were sufficient to sustain the conclusion that defendant was guilty of contributing to the delinquency of a boy under the age of sixteen years, in view of the presumption indulged on appeal that the trial court performed its duty to consider all the evidence before it.

Murphy v. State, 226.

II. DECISIONS REVIEWABLE.

2. *Judgments Appealable.—Order on Application to Stay Proceedings.*—The ruling of the trial court on an application to stay proceedings for nonpayment of the costs of a former suit is not a final judgment from which an appeal may be taken.

Craig v. Norwood, 104, 108 (2).

3. *Theory of Case.—Change on Appeal.*—Where the trial proceeded on the theory of an implied warranty, the court on appeal will not

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permit appellant to change its position and uphold its contention that a written warranty as to quality alone is involved and controls the rights of the parties.

Western Brass Mfg. Co. v. Haynes Auto. Co., 524, 526 (1).

4. *Presenting Questions for Review.—Constitutional Questions.*—Mere abstract propositions of law and general statements, though made under "Points and Authorities" in appellant's brief, are insufficient to present any question; hence the alleged unconstitutionality of a law was not raised where neither the particular section claimed to be invalid, nor the particular constitutional provision claimed to be violated, is definitely pointed out.

Cole Motor Car Co. v. Ludorff, 119, 128 (11).

5. *Record.—Questions Presented for Review.—Exceptions.*—On appeal from a judgment confirming the report of commissioners in partition, the ruling of the court on exceptions to the report may be properly assigned as independent error if the alleged error appears upon the face of the proceedings; but if the questions of fact are involved in the determination of the ultimate ruling or decision upon such exceptions, and are tried by the court as other questions of fact are tried, the questions arising upon such trial must be presented on appeal through the medium of a motion for a new trial.

Burger v. Schnaus, 614, 616 (2).

III. RIGHT OF APPEAL.

6. *Payment of Judgment.—Prosecution of Appeal.—Effect.*—Under §671 Burns 1914, §632 R. S. 1881, inhibiting a person who obtains a judgment from taking an appeal therefrom after receiving any money paid or collected thereon, the mere payment of a judgment or a part thereof by a judgment defendant does not necessarily estop him from prosecuting an appeal therefrom.

Hammond, etc., R. Co. v. Kaput, 543, 548 (1).

IV. PRESENTATION AND RESERVATION IN LOWER COURT.**(A) ISSUES AND QUESTIONS.**

7. *Review.—Theory of Case.*—While the court on appeal will hold a party to the theory of the case adopted in the trial court, such theory will be determined by a consideration of the whole record, hence the mere designation by appellant's counsel of an instrument as a "defeasance" at the time of offering it in evidence was not of controlling importance on the question of theory, in view of the whole record which indicated that it was a conditional contract for the sale of real estate.

Raub v. Lemon, 59, 77 (5).

(B) MOTIONS FOR NEW TRIAL.

8. *Questions Presented.—Motion for New Trial.—Joint Specification.*—Where the specification in the motion for a new trial of error in the giving of instructions was joint, and unavailable because some of the instructions were conceded to be good, an assignment that the verdict is contrary to law predicated on the giving of alleged erroneous instructions, also presents no question.

Kuhn v. Powell, 131, 133 (2).

9. *Presenting Questions for Review.—Directing Verdict.—New Trial.*—Alleged error in directing a verdict is properly presented by assignment as cause for a new trial.

Parker v. Hickman, 152, 158 (5).

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(C) EXCEPTIONS.

10. *Reserving Questions for Review.—Exceptions.—Certainty.*—An exception must be certain and a party will not be permitted to except to one ruling and make his exception apply to another.
Hill v. Chicago, etc., R. Co., 331, 332 (2).
11. *Record.—Exceptions to Rulings.—Questions Presented.*—Where judgment was rendered on demurrer sustained to the complaint, and the only exception disclosed by the record followed the judgment, no question was presented on alleged error in sustaining the demurrer.
Hill v. Chicago, etc., R. Co., 331, 332 (1).

V. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) TIME OF TAKING PROCEEDINGS.

12. *Time for Perfecting.—Effect of Motion to Modify Judgment.*—Under §672 Burns 1914, Acts 1913 p. 65, providing that appeals must be taken within one hundred and eighty days from the time the judgment is rendered, the pendency of a motion to modify the judgment does not operate to extend the time for taking an appeal.
Thomas v. Thomas, 101.
13. *Application for Certiorari.—Refusal of Application.*—Where defendant appealed from a judgment of conviction imposed by the juvenile court, and the judge of such court did not file his special findings until twenty-five days after judgment was rendered, thus leaving but five days to defendant in which to procure the filing of a bill of exceptions containing the evidence and to perfect his appeal as required by §1635 Burns 1914, Acts 1907 p. 221, defendant could not procure a writ of *certiorari* calling for such bill of exceptions on the filing of the transcript without same, although he made a showing that he could not know until the findings were filed that a transcript of the evidence would be necessary, since the statutory limit on the time for perfecting an appeal is jurisdictional, and the hardship resulting from such provisions is beyond the province of the court to remedy.
Parker v. State, 186.

VI. SUPERSEDEAS OR STAY OF PROCEEDINGS.

14. *Supersedeas.—Authority to Grant.*—Where objections to the probate of a will were filed in the office of the circuit clerk, but no notice issued thereon, and the will was later probated in the superior court, followed by the immediate filing of amended objections and notice in the circuit court, as well as a petition in the superior court to set aside the probate, and the probate was thereafter set aside in the superior court, from which judgment the proponent of the will appealed, the court having jurisdiction of such appeal was without authority to grant a writ of *supersedeas* to stay the prosecution in the circuit court of the action in resistance to the will on the ground that such action is being prosecuted without bond as required by statute where objections are made after probate, and that if the action is permitted to go to trial the questions raised by the pending appeal would become moot, since the authority to grant a writ of *supersedeas* is purely statutory and ordinarily can be granted only to stay execution or proceedings in the trial court in the particular case from which the appeal is taken.
Matson v. Matson, 520.

VII. RECORD AND PROCEEDINGS NOT IN RECORD.

15. *Precipe.—Sufficiency.*—A *precipe* calling for a transcript of all pleadings, papers, documents, and records filed or placed on file

APPEAL—Continued.

in the cause, together with all and singular the papers, pleadings, documents and proceedings and order book entries made and filed in the cause in the court of another county from which the venue was changed, was sufficient.

Bright Nat. Bank v. Hartman, 440, 443 (2).

16. *Transcript.—Certificate of Clerk.—Sufficiency.*—The certificate of the clerk to a transcript on appeal is sufficient if it substantially complies with §667 Burns 1914, Acts 1903.

Town of New Carlisle v. Tullar, 230, 232 (1).

17. *Transcript.—Precipe.*—Where the first part of the *precipe* was general and broad enough to include all the instructions, specific directions not in conflict therewith, but which did not call for certain instructions, did not operate to exclude any of the instructions, all of which were copied in the transcript.

Bright Nat. Bank v. Hartman, 440, 445 (4).

18. *Transcript.—Necessity for Written Precipe.*—Under §690 Burns 1914, §649 R. S. 1881, providing that upon request of the appellant the clerk shall make a transcript of the record, "or so much thereof as the appellant, in writing, directs", etc., a written *precipe* is not required where a complete transcript is desired.

Fish v. Hetherington, 645, 648 (4).

19. *Transcript.—Precipe.—Certificate of Clerk.—Review.*—Where the *precipe* directed the clerk to prepare a transcript of the amended complaint, the cross-complaint and all pleadings filed, and to insert the original bill of exceptions, and the clerk's certificate, even if deemed sufficient for any purpose, at most purported to certify that the transcript contained full and true entries in the cause as required by the *precipe*, copies of the judgment and motions for new trial and the rulings thereon, not being called for by the *precipe* nor included in the certificate, were no part of the record though copied therein, and hence no question was presented by alleged error in overruling the motion for a new trial.

Fish v. Hetherington, 645, 647 (3), 648 (3).

20. *Record.—Transcript.—Identity of Pleadings.*—On appeal from the judgment of a circuit court to which the cause had been taken on a change of venue, where the transcript did not show by any caption, statement or certificate of the clerk of the court from which the venue was taken that the original pleadings and papers on file in that court were transferred to the court to which the venue was taken, but it did appear from what purported to be the certificate of such clerk that a "full, true and complete copy of all the order book entries showing the proceedings" was transmitted to the latter court, and that certain pleadings were transmitted, and the transcript on appeal bore the certificate of the clerk of the court from which the appeal was taken showing that it embraced a full, true and correct copy of all pleadings, papers, documents and record filed or placed on file, as requested by the *precipe*, the appellant would not be heard to say that the pleadings copied in the transcript were not the pleadings on which the case was tried, but the court could not know that such pleadings were the identical pleadings challenged by demurrer in the court from which the venue was taken, and could not pass upon assignments of error relating to their sufficiency.

Bright Nat. Bank v. Hartman, 440, 443 (1), 444 (1).

VIII. ASSIGNMENT OF ERRORS.

21. *Demurrer to Supplemental Complaint.*—An assignment of error in overruling a demurrer to a supplemental complaint presents no question for review.

Dietrich v. Minas, 333, 339 (1).

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22. *Sufficiency*.—An assignment of error "in overruling appellant's objections and exceptions", is too indefinite and uncertain to present any question.
Burger v. Schnaus, 614, 615 (1).
23. *Insufficiency of Complaint*.—Under §348 Burns 1914, Acts 1911 p. 415, an assignment of error challenging the sufficiency of a complaint is unavailable.
Fish v. Hetherington, 645, 647 (1).
24. *Joint Assignments*.—A joint assignment of errors, to present any question, must be founded upon a ruling against all of the appellants, and of which all of them have a right to complain.
Coffin v. Pfau, 384, 387 (3).
25. *Questions Presented*.—Assignments of error that certain paragraphs of answer did not state facts sufficient to constitute defenses to the action are not recognized by the law and present no question.
Wainwright Trust Co. v. Dulin, 200, 201 (1).
26. *Questions Presented*.—*Ruling on Joint Motion*.—*Separate Assignments of Error*.—Where appellants assigned error separately on the overruling of a motion which the record discloses was joint, such assignment presented no question.
Pritchard v. Mines, 203, 208 (5).
27. *Revival of Judgment*.—A motion for execution upon a judgment after the lapse of ten years can not be made the basis for an assignment of errors challenging its sufficiency for want of facts.
Coffin v. Pfau, 384, 387 (2).
28. *Questions Presented*.—*Judgment on Demurrer*.—Alleged error in rendering judgment against plaintiff on demurrer presented no question, since by refusing to plead further after the demurrer was sustained plaintiff invited the judgment, and in any event such is not a proper assignment.
Hill v. Chicago, etc., R. Co., 331, 332 (3).
29. *Briefs*.—*Questions Reviewable*.—Where all the propositions of law and authorities cited by appellant in its brief were under headings of error directly challenging the sufficiency of certain paragraphs of answer, and neither the demurrer nor the memorandum accompanying the same, nor either the complaint or answer, were set out in such brief to support the remaining assignment alleging error in overruling the demurrer to appellee's second paragraph of answer, no question was presented.
Wainwright Trust Co. v. Dulin, 200, 202 (2).

IX. BRIEFS.

30. *Questions Presented*.—Where appellant in the preparation of his brief fails to comply with the rules requiring separately numbered propositions or points to be set out under a separate heading of each error relied on, no question is presented.
Fish v. Hetherington, 645, 647 (2).
31. *Sufficiency*.—Briefs showing a good faith effort and substantial compliance with Rule 22 will be considered to the extent that the questions presented may be ascertained therefrom.
Town of New Carlisle v. Tullar, 230, 232 (2).
32. *Sufficiency*.—Where it could be gathered from appellant's brief that certain propositions under points and authorities were directed to alleged error in the admission of certain evidence, the brief was not so defective as to preclude a consideration of the alleged error.
Goldberger v. Arcadian, etc., Springs Co., 1, 2 (1).
33. *Waiver of Error*.—Specifications of error set out in the motion for a new trial, but not presented by appellant's brief, are waived.
Pittsburgh, etc., R. Co. v. Kephert, 621, 624 (1).

APPEAL—Continued.

in the cause, together with all and singular the papers, pleadings, documents and proceedings and order book entries made and filed in the cause in the court of another county from which the venue was changed, was sufficient.

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18. *Transcript.—Necessity for Written Precipe.*—Under §690 Burns 1914, §649 R. S. 1881, providing that upon request of the appellant the clerk shall make a transcript of the record, "or so much thereof as the appellant, in writing, directs", etc., a written *precipe* is not required where a complete transcript is desired.

Fish v. Hetherington, 645, 648 (4).

19. *Transcript.—Precipe.—Certificate of Clerk.—Review.*—Where the *precipe* directed the clerk to prepare a transcript of the amended complaint, the cross-complaint and all pleadings filed, and to insert the original bill of exceptions, and the clerk's certificate, even if deemed sufficient for any purpose, at most purported to certify that the transcript contained full and true entries in the cause as required by the *precipe*, copies of the judgment and motions for new trial and the rulings thereon, not being called for by the *precipe* nor included in the certificate, were no part of the record though copied therein, and hence no question was presented by alleged error in overruling the motion for a new trial.

Fish v. Hetherington, 645, 647 (3), 648 (3).

20. *Record.—Transcript.—Identity of Pleadings.*—On appeal from the judgment of a circuit court to which the cause had been taken on a change of venue, where the transcript did not show by any caption, statement or certificate of the clerk of the court from which the venue was taken that the original pleadings and papers on file in that court were transferred to the court to which the venue was taken, but it did appear from what purported to be the certificate of such clerk that a "full, true and complete copy of all the order book entries showing the proceedings" was transmitted to the latter court, and that certain pleadings were transmitted, and the transcript on appeal bore the certificate of the clerk of the court from which the appeal was taken showing that it embraced a full, true and correct copy of all pleadings, papers, documents and record filed or placed on file, as requested by the *precipe*, the appellant would not be heard to say that the pleadings copied in the transcript were not the pleadings on which the case was tried, but the court could not know that such pleadings were the identical pleadings challenged by demurrer in the court from which the venue was taken, and could not pass upon assignments of error relating to their sufficiency.

Bright Nat. Bank v. Hartman, 440, 443 (1), 444 (1).

VIII. ASSIGNMENT OF ERRORS.

21. *Demurrer to Supplemental Complaint.*—An assignment of error in overruling a demurrer to a supplemental complaint presents no question for review.

Dietrich v. Minas, 333, 339 (1).

APPEAL—Continued.

22. *Sufficiency.*—An assignment of error "in overruling appellant's objections and exceptions", is too indefinite and uncertain to present any question.
Burger v. Schnaus, 614, 615 (1).
23. *Insufficiency of Complaint.*—Under §348 Burns 1914, Acts 1911 p. 415, an assignment of error challenging the sufficiency of a complaint is unavailable.
Fish v. Hetherington, 645, 647 (1).
24. *Joint Assignments.*—A joint assignment of errors, to present any question, must be founded upon a ruling against all of the appellants, and of which all of them have a right to complain.
Coffin v. Pfau, 384, 387 (3).
25. *Questions Presented.*—Assignments of error that certain paragraphs of answer did not state facts sufficient to constitute defenses to the action are not recognized by the law and present no question.
Wainwright Trust Co. v. Dulin, 200, 201 (1).
26. *Questions Presented.—Ruling on Joint Motion.—Separate Assignments of Error.*—Where appellants assigned error separately on the overruling of a motion which the record discloses was joint, such assignment presented no question.
Pritchard v. Mines, 203, 208 (5).
27. *Revival of Judgment.*—A motion for execution upon a judgment after the lapse of ten years can not be made the basis for an assignment of errors challenging its sufficiency for want of facts.
Coffin v. Pfau, 384, 387 (2).
28. *Questions Presented.—Judgment on Demurrer.*—Alleged error in rendering judgment against plaintiff on demurrer presented no question, since by refusing to plead further after the demurrer was sustained plaintiff invited the judgment, and in any event such is not a proper assignment.
Hill v. Chicago, etc., R. Co., 331, 332 (3).
29. *Briefs.—Questions Reviewable.*—Where all the propositions of law and authorities cited by appellant in its brief were under headings of error directly challenging the sufficiency of certain paragraphs of answer, and neither the demurrer nor the memorandum accompanying the same, nor either the complaint or answer, were set out in such brief to support the remaining assignment alleging error in overruling the demurrer to appellee's second paragraph of answer, no question was presented.
Wainwright Trust Co. v. Dulin, 200, 202 (2).

IX. BRIEFS.

30. *Questions Presented.*—Where appellant in the preparation of his brief fails to comply with the rules requiring separately numbered propositions or points to be set out under a separate heading of each error relied on, no question is presented.
Fish v. Hetherington, 645, 647 (2).
31. *Sufficiency.*—Briefs showing a good faith effort and substantial compliance with Rule 22 will be considered to the extent that the questions presented may be ascertained therefrom.
Town of New Carlisle v. Tullar, 230, 232 (2).
32. *Sufficiency.*—Where it could be gathered from appellant's brief that certain propositions under points and authorities were directed to alleged error in the admission of certain evidence, the brief was not so defective as to preclude a consideration of the alleged error.
Goldberger v. Arcadian, etc., Springs Co., 1, 2 (1).
33. *Waiver of Error.*—Specifications of error set out in the motion for a new trial, but not presented by appellant's brief, are waived.
Pittsburgh, etc., R. Co. v. Kephert, 621, 624 (1).

APPEAL—Continued.

X. DISMISSAL.

34. *Moot Questions*.—Where it appears that the controversy has been settled, or that the appealing party has no further interest therein, the appeal will be dismissed.

Hammond, etc., R. Co. v. Kaput, 543, 548 (2).

35. *Term Time Appeal*.—*Failure to Perfect*.—Where no time was asked or granted to appellant by the trial court in which to file his appeal bond beyond the term, the filing of what purported to be an appeal bond in vacation in the clerk's office and taking no further action thereon other than to copy the same into the transcript was not a compliance with the statute in reference to a term time appeal, and the appeal not having been thereafter perfected as a vacation appeal, a dismissal was required. *Disher v. Prentress*, 619.

XI. REVIEW.

(A) AS TO EVIDENCE.

36. *Admission of Evidence*.—In an administrator's action for the wrongful death of his decedent, brought for the benefit of decedent's surviving husband, the admission of testimony by the husband as to the extent of his property, though improper, was not ground for review in the absence of any specific objection directing the attention of the trial court to the infirmity in such testimony.

Chicago, etc., R. Co. v. Biddinger, 419, 439 (18).

37. *Findings*.—The court on appeal can not weigh conflicting evidence, but, where the decision is challenged for insufficiency of the evidence, it will determine whether there is any evidence to support the decision, and in so doing will consider only the evidence most favorable to the appellee.

Aultman, etc., Mach. Co. v. Shell, 19, 22 (1).

38. *Findings*.—Where the evidence showed that six lot owners who were tenants in common of a strip back of their lots deeded their interests to each other in severalty so that each became the owner of the strip adjoining such lot, the interest of appellees, based upon the inchoate right of their mother, widow of the former owner of such strip who conveyed without his wife joining, amounted to an undivided one-third part in value of the undivided one-sixth of that portion of the strip adjoining the particular lot involved, so that a finding that the appellees were the owners of an undivided one-third interest was erroneous.

Wachstetter v. Johnson, 659, 676 (10).

39. *Findings*.—Where the evidence showed that in an exchange of real estate one of the parties to the trade agreed to execute a mortgage to the other to secure the latter on account of assuming an indebtedness of the former on property transferred, upon condition that certain property, which the party agreeing to execute the mortgage had not seen, should on investigation prove to be as represented in the negotiations, the court was warranted in finding that the promise to execute the mortgage and to pay the sum secured thereby was conditional rather than absolute; and in view of further evidence that on investigation the property as to which the representations were made proved to be materially different in value and title than as represented, a finding of the non-existence of a promise to pay was also warranted.

Simmons v. Parker, 403, 411 (2).

40. *Prejudicial Error*.—*Incompetent Evidence*.—Incompetent evidence on a material matter is presumed to be harmful, unless the record shows the contrary.

Pittsburgh, etc., R. Co. v. Lamm, 389, 398 (8).

APPEAL—Continued.

41. *Sufficiency*.—In an indorsee's action on a promissory note, defended on the ground that plaintiff was not a good faith purchaser for value before maturity, the verdict, being supported by evidence warranting the inference of every fact essential to the defense, was conclusive.
Bright Nat. Bank v. Hartman, 440, 451 (12).
42. *Weight and Sufficiency*.—The court will not weigh the evidence on appeal and will deem it sufficient to uphold the verdict if it supplies reasonable ground for inferring the facts essential to a recovery.
Elliot v. Elliot, 209, 214 (5).
43. *Weight of Evidence*.—The court on appeal can not weigh the evidence.
Pittsburgh, etc., R. Co. v. Kephert, 621, 624 (2).
44. *Verdict*.—Where the record disclosed that the verdict was fully supported by the evidence, there was no error in overruling the motion for a new trial upon the ground of insufficient evidence.
Chicago, etc., R. Co. v. Fisher, 10, 18 (6).

(B) AS TO INSTRUCTIONS.

45. The objection that an instruction is based upon a statute claimed to be unconstitutional is unavailable where the undisputed evidence shows that the case involved a portion of the statute which is not claimed to be invalid, and the instruction given was applicable to the evidence.
Cole Motor Car Co. v. Ludorff, 119, 128 (9), 129 (9).
46. Where the issues were drawn and the case tried on the theory that there was an implied warranty of the goods sold to defendant, instructions stating the law upon that theory were not erroneous and if plaintiff desired an instruction upon the written contract involved, it should have requested same.
Western Brass Mfg. Co. v. Haynes Auto. Co., 524, 528 (3).
47. In an action against an administrator to recover a claim against his decedent's estate, an instruction that defendant had a right to prove payment without a formal plea of payment, but that the burden of proof was upon him to prove payment if he relied upon it as a defense, was not objectionable on the ground that no burden rested on defendant until plaintiff had made proof of all material allegations of the complaint, in view of an instruction which fully informed the jury as to the burden resting on plaintiff.
Elliot v. Elliot, 209, 212 (1).
48. *Answers to Interrogatories*.—The court on appeal can not say that erroneous instructions are harmless in view of the jury's answers to interrogatories, where it does not appear that the interrogatories would not have been differently answered had proper instructions been given.
Watts v. Chicago, etc., R. Co., 51, 58 (6).
49. *Applicability to Evidence*.—In an action for injuries received by plaintiff who was struck by an automobile while crossing a street, where there was evidence that the collision occurred about dusk at a business portion of the city with which plaintiff was not familiar, and where the operation of street cars and traffic made much noise, that the automobile approached without a light and without the sounding of the horn, and that plaintiff was unaware of its approach until the instant it was upon her, etc., an instruction defining ordinary care and stating that the law does not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind that would otherwise be required under circumstances not indicating sudden peril, was applicable to the evidence and was properly given.
Cole Motor Car Co. v. Ludorff, 119, 127 (8).

APPEAL—Continued.

50. *Conflict*.—An instruction that if defendant violated an ordinance by running the train which killed plaintiff's decedent at an excessive rate of speed, and if such excessive speed was the proximate cause of decedent's death, the verdict should be for plaintiff, and one stating that the mere running of a train in excess of the speed allowed by municipal ordinance is not actionable negligence in favor of a trespasser, and that if plaintiff's decedent was a trespasser, and the defendant's only negligence was in running the train at a speed in excess of that allowed by ordinance, the verdict should be for defendant, were inconsistent with each other and the giving of same was error. *Watts v. Chicago, etc., R. Co.*, 51, 53 (1).
51. *Contradictory Instruction*.—*Damages*.—*Elements*.—A requested instruction that if the rainfall of itself produced the injuries complained of the verdict should be for defendants, even though the alleged obstructions in the stream existed and caused the water to back up over plaintiff's lands deeper and caused it to remain longer than it would have without the existence of such obstructions, was contradictory within itself and properly refused, since the damage could not have been wholly produced by rainfall if other causes caused the water to remain longer on plaintiff's land, and the damage would be increased by lengthening the time the water stood on the land. *Southern R. Co. v. Weidenbrenner*, 314, 320 (5).
52. *Issues*.—In an action on an oral contract, where defendant filed a counterclaim for damages, an instruction that in case the jury found anything due on the counterclaim "it must be deducted from the \$106 which is due the plaintiffs", aside from the fact that it was more or less vague and indefinite, was erroneous for the reason that under the issues the jury could find for plaintiffs on the complaint, and on the counterclaim for defendant in an amount greater than the plaintiff's claim, in which event the latter amount should have been deducted from the amount found due on the counterclaim. *Bump v. McGrannahan*, 136, 142 (4).
53. *Record*.—Where certain instructions were lost, and the trial court by order duly entered of record permitted a substitution of such lost instructions, and no error or omission was pointed out in the instructions thus embodied in the record, the action of the trial court was not an abuse of discretion, and appellant's objection that the instructions are not all in the record can not prevail. *Watts v. Chicago, etc., R. Co.*, 51, 58 (7).
54. *Peremptory Instruction*.—Where appellee's evidence was sufficient to warrant the recovery granted him, and there was no evidence which controverted it in any essential, the court was fully justified in giving a peremptory instruction for plaintiff. *Colvert v. Harrington*, 608, 613 (7).
55. *Questions Reviewable*.—*Directing Verdict*.—*Record*.—A consideration of the correctness of an instruction directing a verdict for plaintiff requires an examination of both the issues and the evidence; hence, the question of alleged error in the giving of such an instruction was not properly before the court, where neither the evidence, nor the defendant's answer to the paragraph of complaint on which the verdict rested, was in the record. *Dietrich v. Minas*, 333, 341 (5).
56. *Refusal to Direct Verdict*.—In an action on an oral contract, in which defendant filed a counterclaim for damages, where the evidence, though not clear or satisfactory, was such that the court could not say as a matter of law that there was no evidence from which an inference of liability on the counterclaim could have

APPEAL—Continued.

been reasonably drawn by the jury, there was no error in refusing an instruction to return a verdict for plaintiffs.

Bump v. McGrannahan, 136, 143 (5).

57. *Refusal of Instructions.*—There was no error in the refusal of instructions requested, but not applicable to the case, as well as of one fully covered by instructions given.

Chicago, etc., R. Co. v. Biddinger, 419, 438 (17).

58. *Refusal of Instructions.*—Where instructions tendered were either incorrect statements of the law or were substantially included in instructions given, their refusal was not error.

Vandalia Coal Co. v. Alsopp, 649, 658 (4).

59. *Refusal of Instructions.*—Although a requested instruction stated the law correctly, its refusal was not reversible error in view of another instruction given which fully covered the subject.

Southern R. Co. v. Weidenbrenner, 314, 318 (1), 321 (1).

60. *Refusal of Instructions.*—Where the instructions given fully and accurately stated the law, there was no error in the refusal of requested instructions fully covered thereby or which were mis-statements of the law. *Bright Nat. Bank v. Hartman*, 440, 451 (11).

61. *Refusal of Instructions.*—A requested instruction containing an assumption not warranted by the evidence and also taking from the jury the question of contributory negligence, where under the facts such question was not one of law, was properly refused.

Cleveland, etc., R. Co. v. Cloud, 256, 266 (5).

62. *Refusal of Instructions.*—There was no error in the refusal of instructions in the absence of evidence in the record to justify giving them, nor in the refusal of an instruction which, in so far as it was applicable, was fully covered by instructions given.

Vandalia R. Co. v. Parker, 146, 151 (4).

63. *Refusal of Instructions.*—In an action on a claim against a decedent's estate, there was no error in refusing a requested instruction to the effect that admissions made by decedent prior to his death that he was indebted to plaintiff would not in themselves be sufficient to prove the indebtedness, in view of another instruction which, when considered with instructions given on the subject of verbal negotiations between plaintiff and decedent, fully covered the matters included in the instruction refused.

Elliot v. Elliot, 209, 213 (3).

64. *Submitting Interrogatories to Jury.*—An instruction advising the jury that interrogatories would be submitted and that the jury might first determine its general verdict, or, if preferable, it could answer the interrogatories first, or that it could consider the verdict and interrogatories at the same time, etc., was harmless in view of the record, although under §562 Burns 1914, §536 R. S. 1881, there is no necessity for answering interrogatories where no general verdict is reached.

Southern R. Co. v. Weidenbrenner, 314, 321 (7).

(C) AS TO PLEADINGS.

65. *Theory of Complaint.*—Where the predominating theory of a complaint is uncertain, the court on appeal will follow the theory adopted in the trial court.

Pittsburgh, etc., R. Co. v. Lamm, 389, 395 (5).

66. *Demurrer to Complaint.*—*Action Prematurely Brought.*—The sustaining of a demurrer to a complaint was not error, where it affirmatively appeared that the action was prematurely commenced.

Simmons v. Parker, 403, 406 (1).

APPEAL—Continued.

67. *Demurrer to Complaint.—Insufficient Memorandum.*—Although the memorandum accompanying a demurrer may be insufficient to present the defect in a complaint, the court on appeal is not precluded from deciding the question where it is presented by the exceptions to the conclusions of law.

Miami County Bank v. State, ex rel., 628, 633 (6).

68. *Motion for Judgment.*—Where the complaint stated a cause of action and a reply to the answer was sufficient to avoid the answer, the court properly overruled defendant's motion for judgment on the pleadings *non obstante veredicto*.

Vandalia Coal Co. v. Alsopp, 649, 658 (3).

69. *Questions Reviewable.—Ruling on Demurrer.—Record.*—No question is presented on the overruling of a demurrer where such demurrer is not in the record.

Dietrich v. Minas, 333, 341 (4).

70. *Record.—Ruling on Demurrer.—Waiver of Error.*—Alleged error in overruling a demurrer is waived by appellant's failure to set out the demurrer or the substance of the same, and by failing to set out any memoranda of objections to the complaint.

Miami County Bank v. State, ex rel., 360, 366 (1).

71. *Ruling on Demurrers.—Demurrers Unaccompanied by Memoranda.*—Alleged error in sustaining demurrers to certain paragraphs of answer on the ground that such demurrers were not accompanied by memoranda of defects as required by §§344, 348 Burns 1914, Acts 1911 p. 415, was unavailable in view of the fact that the rulings were right on the merits.

Parker v. Hickman, 152, 158 (3).

72. *Ruling on Demurrer.—Failure to File Memorandum of Defects.*—The failure to file a memorandum of defects with the demurrer to a complaint, does not of itself operate to make the ruling of the trial court in sustaining such demurrer erroneous, since on appeal the court may look beyond a memorandum in order to uphold the sustaining of a demurrer.

Lauffer v. Lauffer, 508, 510 (1).

73. *Questions Presented.—Rulings on Demurrers.—Demurrers Unaccompanied by Memoranda.*—While the court on appeal may look beyond the memorandum of defects accompanying a demurrer for the purpose of sustaining the ruling of the trial court sustaining such demurrer, where a demurrer is overruled, and no memorandum of defects was filed therewith, the ruling presents no question on appeal.

Parker v. Hickman, 152, 158 (4).

(D) DISCRETION OF COURT.

74. *Refusal to Strike Out Answer.*—The overruling of a motion to strike out certain paragraphs of answer was not error, where under the facts shown leave to file such paragraphs was a matter within the sound discretion of the court.

Roder v. Niles, 4, 6 (1).

(E) VERDICT, FINDINGS AND ANSWERS TO INTERROGATORIES.

75. *Verdict.—Conclusiveness.*—Where different inferences may be reasonably drawn from the evidence and the jury has drawn the inferences necessary to support the verdict, the judgment will not be reversed on the ground of insufficient evidence.

Bright Nat. Bank v. Hartman, 440, 452 (13).

76. *Issues of Facts.—Conflicting Affidavits.—Conclusiveness of Finding.*—An issue of fact determined by the trial court on conflicting affidavits is conclusive on appeal.

Craig v. Norwood, 104, 110 (7).

APPEAL—Continued.

77. *Conclusiveness.*—Special findings of fact will not be set aside on the ground of the insufficiency of the evidence where there is some evidence to sustain them, and in the absence of anything to show that the court made a mistake in arriving at the result.
Goldberger v. Goldberger, 31.
78. *Answers to Interrogatories.—Scope of Review.*—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories the court on appeal will consider only the general verdict, the interrogatories and answers thereto, and the pleadings.
Morrissey v. Cleveland, etc., R. Co., 90, 99 (4).
79. *Questions Presented.—Answers to Interrogatories.—Scope of Review.*—The court on appeal in reviewing the overruling of a motion for judgment on the jury's answers to interrogatories, can consider only the issues, the general verdict and the answers to the interrogatories.
Cole Motor Car Co. v. Ludorff, 119, 122 (1).
80. *Answers to Interrogatories.—Presumption Favoring Verdict.*—On appeal from a judgment for defendant on the jury's answers to interrogatories notwithstanding a general verdict for plaintiff in an action for the death of plaintiff's decedent at a railroad crossing, the court must assume in favor of the general verdict that decedent looked for an approaching train.
Baker v. Baltimore, etc., R. Co., 454, 460 (3).
81. *Judgment on Answers to Interrogatories.*—In determining the correctness of the trial court's ruling sustaining a motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff, the court on appeal will not look to the evidence actually given in the case, but will search the pleadings to see if by any evidence possible under the issues such answers can be reconciled with the general verdict, and every possible reasonable inference and presumption deducible from evidence which might have been admitted in support of such verdict will be indulged in its favor.
Baker v. Baltimore, etc., R. Co., 454, 456 (1).
82. *Interrogatories to Jury.*—An interrogatory submitted to the jury asking "if plaintiff had looked with reasonable care could she have seen the automobile which struck her while it was traveling a space of more than one square before it struck her," was not objectionable as calling for the ultimate conclusion of the jury as to whether plaintiff under all the facts and circumstances of the case exercised ordinary care for her own safety, though it was perhaps objectionable in that it involved the application of a legal principle to determine whether if plaintiff had "looked with reasonable care," she could have seen the approaching automobile.
Cole Motor Car Co. v. Ludorff, 119, 123 (4).

(F) HARMLESS ERROR.

83. *Admission of Evidence.*—There was no error in the admission of certain parol evidence, where it appears that such evidence was covered by documentary evidence admitted without objection.
Wachteller v. Johnson, 659, 677 (11).
84. *Admission of Evidence.*—Error, if any, in admitting in evidence certain telegrams in support of a motion to strike out an affidavit denying notice of the taking of a certain deposition offered in evidence, was cured by the overruling of such motion.
Voorhees v. Cragun, 690, 702 (9).

APPEAL—Continued.

85. *Instructions*.—Where no damages were allowed on appellee's cross-complaint, error, if any, in instructions given upon the question of damages claimed in such cross-complaint was harmless.
Western Brass Mfg. Co. v. Haynes Auto. Co., 524, 529 (4).
86. *Instructions*.—Instructions given, and objected to, on the ground that they were not applicable to the evidence under the issues, afforded appellant no reason to complain, where it appeared they required more from appellee than was necessary to support his case, and were more favorable to appellant than it was entitled to.
Pittsburgh, etc., R. Co. v. Ellis, 172, 177 (2).
87. *Instructions*.—While the practice of reading the complaint to the jury instead of stating the issues and theory of the complaint is subject to criticism, such action does not constitute reversible error, and especially where it appears that the court in another instruction told the jury that the complaint is not evidence and that the jury should not be influenced in any manner by the statements therein contained.
Chicago, etc., R. Co. v. Biddinger, 419, 432 (10).
88. *Refusal of Instructions*.—The refusal of an instruction giving a substantially correct definition of a watercourse was harmless, where there was no dispute about the stream involved being a watercourse.
Southern R. Co. v. Weidenbrenner, 314, 319 (4).
89. *Interrogatories to Jury*.—*Concealed Assumption of Fact*.—In an action against a railroad company for the death of plaintiff's decedent in a crossing accident, interrogatories to the jury asking how far plaintiff's decedent could have seen the train which struck her, when she was certain distances from the track, had she looked in the direction from which the train was coming, improperly contained a concealed assumption that the train which struck decedent was within her range of vision, but the error was harmless in view of the fact that the trial court ignored the assumption and gave to the answers a construction as favorable to the general verdict as any fair interpretation of such interrogatories permitted.
Baker v. Baltimore, etc., R. Co., 454, 459 (2).
90. *Ruling on Demurrer*.—The sustaining of a demurrer to a paragraph of answer alleging infirmities in a note that had been transferred by indorsement before maturity, was harmless even though such answer may have sufficiently alleged notice on the part of the transferee, where there was another good paragraph covering the same fact and under which evidence was admissible without imposing any additional burden on defendant.
Parker v. Hickman, 152, 157 (2).
91. *Supplemental Complaint*.—*Demurrer*.—Even if the action of the trial court in permitting the filing of a supplemental complaint, and in overruling a demurrer thereto, was erroneous, it was harmless in view of the fact that verdict and judgment were upon a second or additional paragraph of complaint.
Dietrich v. Minas, 333, 339 (2).
92. *Variance*.—In an action on the bond of a contractor by one claiming to be an assignee of claims for labor and material, where the evidence showed that plaintiff was not an assignee but that the indebtedness was due plaintiff through a direct arrangement between plaintiff and defendant, the variance between the pleading and proof was immaterial in view of a showing that a right result was reached, and the complaint was deemed amended to conform to the proof.
Title Guaranty, etc., Co. v. State, ex rel., 268, 290 (9), 294 (9).

APPEAL—Continued.

(G) ERROR WAIVED.

93. *Waiver of Error.—Briefs.*—Alleged error is waived by appellant's failure to present same in its brief.

Bright Nat. Bank v. Hartman, 440, 445 (3).

94. *Waiver of Error.*—Alleged error in the exclusion of testimony is waived by failure of appellant's brief to disclose the place in the transcript where the action complained of may be found, and also by appellant's failure to direct any of the points and authorities to such alleged error.

Smith v. Toth, 42, 50 (6).

XII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) DECISION IN GENERAL.

95. *Constitutional Questions.—Determination of Cause on Merits.*—Where the merits of a cause may be passed on without deciding a constitutional question the courts do so.

Cole Motor Car Co. v. Ludorff, 119, 129 (12).

(B) AFFIRMANCE.

96. *Stay of Proceedings.*—The court on appeal indulges the presumption that the trial court's action in refusing to stay proceedings until payment of the costs of prior suits was proper, and will not reverse the judgment on the ground that such action was an abuse of discretion unless such an abuse is clearly and unequivocally shown.

Craig v. Norwood, 104, 110 (6).

97. *Amendments Pending Trial.*—A judgment on a verdict directed on a second or additional paragraph of complaint, which plaintiff was permitted to file at the close of the evidence, will not be reversed for alleged error in allowing such amendment, where the record discloses that defendant merely objected and made no showing that he was prejudiced thereby, since it must be presumed that the amendment was permitted to conform to the evidence.

Dietrich v. Minas, 333, 339 (3).

(C) REVERSAL.

98. *Findings.*—Where the evidence in a partition suit did not support a finding of the trial court as to certain interests in a portion of the real estate involved, the conclusion of law based on such finding was erroneous and necessitated a reversal.

Wachstetter v. Johnson, 680.

99. *Unliquidated Damages.*—Where the damages sought to be recovered are unliquidated, the court on appeal can not sustain the judgment, in view of improper evidence on the question of damages, since to do so would be to assess the damages and is beyond the province of the court.

Pittsburgh, etc., R. Co. v. Lamm, 389, 399 (10).

(D) ORDERING NEW TRIAL.

100. *New Trial.*—Although there is no motion for a new trial in the record, the court on appeal will order a new trial if it appears that the ends of justice will thereby be best subserved.

Morrissey v. Cleveland, etc., R. Co., 90, 101 (7).

APPELLATE COURT—

Can not weigh the evidence, see APPEAL 43.

The, does not have jurisdiction to dispose of a case in which a constitutional question is properly raised and presented, see COURTS 2.

APPELLATE—Continued.

Although a cause in the, involves questions as to which there is apparent conflict in the decided cases of the Supreme Court, where the principle on which the opinion must be based has been given recognition in both the earlier and later of these decisions as well as in those of the United States Supreme Court, the Appellate Court may follow those cases which it may deem to be supported by the better reason and authority, see COURTS 1.

ASSIGNMENTS—

See MORTGAGES 1, 2.

Action on.—Where the bond of a contractor for the construction of a public highway was conditioned for the payment of all debts incurred in the prosecution of the work, including labor and materials furnished, a bank, claiming to be the assignee of the claims of laborers and materialmen, was authorized, if its position was really that of an assignee, to maintain an action by virtue of such sale and assignment against the surety on the contractor's bond, in case of default in payment, in the absence of anything in the contract of assignment precluding the right to maintain such action.

Title Guaranty, etc., Co. v. State, ex rel., 268, 272 (1).

ASSIGNMENT OF ERRORS—

See APPEAL 21-29.

When too indefinite and uncertain to present any question, see APPEAL 22.

ASSUMPTION OF RISK—

See MASTER AND SERVANT 3, 7.

ATTORNEY AND CLIENT—

Attorney's fees, see PARTITION 1.

1. *Attorney's Lien.—Protection by Courts.—Settlement Between Parties.—Dismissal of Appeal.*—Where attorneys for plaintiff in an action for personal injuries filed a lien on the judgment obtained for him, from which judgment defendant appealed, and while the appeal was pending defendant settled with plaintiff in full without the knowledge or consent of his attorneys, a dismissal of defendant's appeal was required in order to preserve the lien rights of plaintiff's attorneys as against defendant, since the settlement was a constructive fraud on plaintiff's attorneys, which the court could not aid by a possible reversal of the judgment.

Hammond, etc., R. Co. v. Kaput, 543, 551 (6).

2. *Compensation of Attorney.—Settlement with Client.—Rights of Attorney.*—The settlement of a case between plaintiff and defendant made after a judgment has been rendered for plaintiff and without the knowledge or consent of plaintiff's attorneys, who have taken a lien of record for their fee, is a constructive fraud on such attorneys, and they may assert and enforce their interest in the judgment regardless of the settlement.

Hammond, etc., R. Co. v. Kaput, 543, 550 (5).

3. *Compensation of Attorney.—Equitable Lien.*—Where a fund has been secured to the client by the efforts of his attorney, and the compensation of the attorney is either expressly or impliedly such a charge against the fund as to amount to an assignment of some part thereof, equity will aid the attorney in the enforcement of his claim.

Hammond, etc., R. Co. v. Kaput, 543, 549 (4).

AUTHORITY—

To conduct business, see LICENSES 1.

AUTOMOBILE—

Driving, see NEGLIGENCE 8, 9.

See NEGLIGENCE 2-5.

BANKS AND BANKING—

1. *Deposits.—Payment.—Notice.*—Where plaintiff, who was induced through fraud to purchase stock in an oil company, paid for same by check drawn on his general deposit in defendant bank, and the seller, after depositing the check to his account, drew part of the funds and had the bank certify a check for the remainder, the bank was not liable to plaintiff for having honored the seller's check after notice from plaintiff not to do so, since in the absence of a prior rescission of the stock transaction, the title to the check given by plaintiff and the proceeds thereof passed to the seller and under the circumstances the bank would have been liable to him in case of its refusal to honor his check.

Barnard v. First Nat. Bank, 634, 636 (2).

2. *Trust Funds.—Action on Bond.—Liability of Bank.*—Where a bank permitted an administrator to deposit funds of the estate to his individual account, and to check against such funds while knowing that he was misapplying them, liability could not be enforced against it in an action on the bond of the administrator which it did not execute, since its liability was not *ex contractu*, but was that of a co-trustee *ex maleficio*, by reason of its wrongful dealing with such trust fund.

Miami County Bank v. State, ex rel., 360, 373 (5).

3. *Trust Funds.—Knowledge of Character of Funds.—Liability of Bank.*—The fact that a bank has knowledge that funds deposited are trust funds is an important circumstance which calls for caution in dealing with and honoring checks upon such deposit, though such knowledge is not sufficient in and of itself to create liability or to cause the bank to require the depositor to place such funds in an account separate and apart from his individual account.

Miami County Bank v. State, ex rel., 360, 369 (3).

4. *Trust Funds.—Liability of Bank.*—A person having charge of trust funds may deposit them in a bank to the credit of his personal account and check them out in the usual course of business, and the bank, though knowing the character of the funds, is not thereby made liable to the beneficiary or actual owner in the absence of knowledge that the depositor is misappropriating such funds; but if, with knowledge of the character of the funds, the bank applies them to the payment of the personal debt of the depositor to it, or knowingly accepts payment out of such funds, or knowingly assists or permits the depositor to misuse or misapply the funds, it may be held liable therefor to the beneficial or actual owner.

Miami County Bank v. State, ex rel., 360, 368 (2).

BILLS AND NOTES—

1. *Action.—Notice.*—The mere endorsement of a note without recourse is not of itself sufficient to put the purchaser on inquiry.

Colvert v. Harrington, 608, 611 (4).

2. *Action.—Burden of Proof.*—In an action on a note, defended on the ground of want of consideration, and that plaintiff was not a *bona fide* holder without notice, the burden was on defendant to

BILLS AND NOTES—Continued.

make out his defense after plaintiff had produced in evidence the written instruments involved and a stipulation as to the amount of attorney fees in the event of a recovery.

Colvert v. Harrington, 608, 610 (2).

3. *Action.—Issues.—Evidence.—Tax Schedule.*—In an action on a note, where one of the issues raised was as to whether plaintiff was the real party in interest, and there was evidence to show that plaintiff purchased the note for full value before the commencement of the action, the tax schedule of plaintiff introduced in evidence which failed to show the listing of the note in question for taxation, constituted competent evidence against him proper to be considered upon such issue, requiring the court to submit such issue to the jury, and its failure to do so constituted reversible error.

Parker v. Hickman, 152, 161 (8), 163 (8).

4. *Action by Indorsee.—Sufficiency of Evidence.—Notice.*—Notice to an indorsee of a promissory note of facts or circumstances to put him on inquiry may be shown by a fair preponderance of the evidence bearing on such issue.

Bright Nat. Bank v. Hartman, 440, 449 (10).

5. *Action by Transferee.—Knowledge of Infirmities.—Answers.—Sufficiency.*—In an action on a note governed by the law merchant and transferred by indorsement before due, answers alleging defenses in favor of the maker against the original payee, but not alleging any notice or knowledge thereof on the part of such transferee, were insufficient to withstand a demurrer.

Parker v. Hickman, 152, 157 (1).

6. *Alteration.—Implied Authority.*—The authority of a payee to fill blank spaces in a note may be implied from circumstances and from facts proved.

John Kindler Co. v. First Nat. Bank, 79, 89 (7).

7. *Alteration.—Authority of Payee.—Rate of Interest.*—The payee of a promissory note may change the interest rate as expressed therein to make the note conform to what the parties agreed or intended it should have been, and such change will not amount to a material alteration.

John Kindler Co. v. First Nat. Bank, 79, 86 (3).

8. *Alteration.—Inserting Rate of Interest.—Effect.*—In view of the fact that under §7952 Burns 1914, §5200 R. S. 1881, a note without stipulation as to interest would draw interest at six per cent. from maturity, the act of the payee in filling blank spaces therein to show that the note bears interest at such rate from maturity can not be deemed a material alteration.

John Kindler Co. v. First Nat. Bank, 79, 86 (4).

9. *Alteration.—Evidence.—Implied Authority.*—In an action on a note, claimed by defendant to have been altered by inserting the place of payment and the rate and time of commencement of interest, evidence showing that during a long course of dealing with payee the defendant of the executed notes containing blanks with reference to such provisions which blanks were later filled by payee, and that as such notes matured the defendant paid them without objection, etc., warranted the jury in finding that the payee had at least implied authority to fill such blanks in the note sued on.

John Kindler Co. v. First Nat. Bank, 79, 87 (6).

10. *Alteration.—Bona Fide Purchaser.—Evidence.—Verdict.—Conclusiveness.*—The fact that the place of payment, the rate of interest, and the time of the commencement of interest, are written in a note in different handwriting than that of the other written portions thereof, does not as a matter of law put a purchaser thereof on inquiry as to whether it has been altered; hence where there

BILLS AND NOTES—Continued.

was evidence to show that after the execution and delivery of a note blank spaces therein were filled by the payee's agent pursuant to a general understanding with the maker, though without the latter's specific knowledge, so as to show the place of payment, the rate and time for commencement of interest, after which through a series of indorsements it reached plaintiff as a purchaser for value, a verdict for plaintiff was conclusive as against the objection that plaintiff was not a *bona fide* purchaser without notice.

John Kindler Co. v. First Nat. Bank, 79, 82 (2).

11. *Bona Fide Purchaser.—Notice.*—The mere fact that the endorsee of a note objected to endorsement without recourse until he learned that the maker was perfectly solvent does not show that he had constructive notice of any defect in the indorser's title.

Colvert v. Harrington, 608, 612 (5).

12. *Bona Fide Purchaser.—Suspicion.*—Circumstances calculated to awaken suspicion merely are not sufficient to show that the purchaser of a note was not a *bona fide* purchaser without notice, but they must be such as to irresistibly lead to the conclusion that he had notice.

Colvert v. Harrington, 608, 613 (6).

13. *Burden of Proof.—Fraud or Illegality.*—Where fraud or illegality in the execution or procurement of a note is set up as a defense to the suit of an indorsee, the burden is on the plaintiff to show his protection from such defense as a good faith purchaser for value before maturity of the note.

Bright Nat. Bank v. Hartman, 440, 448 (8).

14. *Burden of Proof.—Consideration.*—Where want of consideration is pleaded by the maker of a promissory note as a defense to the suit of an indorsee of such note, the burden is on the defendant to prove such defense by a fair preponderance of the evidence bearing on that question.

Bright Nat. Bank v. Hartman, 440, 448 (7).

15. *Defenses.—Want of Consideration.*—Evidence to establish a defense of want of consideration is irrelevant as to the indorsees of a note, unless it is made to appear that they had notice, or notice of facts sufficient to place them on inquiry.

Colvert v. Harrington, 608, 610 (3).

16. *Defenses.—Pleading.—Non Est Factum.*—In an action by the endorsee of a note, an answer in general denial, and a special paragraph to the effect that defendants executed a note to payee, but that when delivered it did not contain certain words, that such note was subsequently changed by the addition of such words without the knowledge or consent of defendants, and that defendants paid the payee without knowledge that the note had been changed or transferred, each being verified, had the force of a plea of *non est factum*.

John Kindler Co. v. First Nat. Bank, 79, 81 (1).

17. *Indorsement.—Rights of Purchasers.*—Though a good faith purchaser for value before maturity of a negotiable promissory note, fair and regular on its face, payable at a bank in this State, is protected from defenses that might be available against the original payee, one dealing in commercial paper is required to use reasonable diligence and to take cognizance of any fact or circumstance that is reasonably calculated to excite the suspicion of a reasonably cautious person, and if the facts or circumstances are such as to put a reasonably cautious person on inquiry, he can not refrain from such inquiry and occupy the position of a good faith purchaser.

Bright Nat. Bank v. Hartman, 440, 449 (9).

18. *Transfer Before Maturity.—Inquiry as to Defenses.—Evidence.*—Evidence merely showing that the purchaser before maturity of a note governed by the law merchant knew the business in which the

BILLS AND NOTES—Continued.

payee was engaged and that it received paper in payment for horses, and that a warranty accompanied each horse sold, was insufficient to awaken suspicion that there was likely to be a defense to the payment of such note, based upon the fact that it was given in payment for a horse which failed to comply with a warranty as to his breeding qualities. *Parker v. Hickman*, 152, 160 (7).

19. *Transfer Before Maturity.—Knowledge of Infirmities.—Duty to Inquire.*—Where the holder of a negotiable paper governed by the law merchant becomes possessed of the same in due course of business before maturity, for a valuable consideration without knowledge or notice of any infirmity therein as between antecedent parties, he holds it free from defenses, unless there are circumstance which excite suspicion, in which event it becomes his duty to make inquiry, and failure to do so prevents his occupying the attitude of a good faith purchaser.

Paker v. Hickman, 152, 159 (6).

BOARD OF COMMISSIONERS—

Power of, see **HIGHWAYS 3.**

BOARD OF HEALTH—

Contract with secretary of the board of town trustees to care for small-pox patients during an emergency was not a criminal offense, see **MUNICIPAL CORPORATIONS 1, 3.**

BOARD OF MANAGERS—

See **CORPORATIONS 3-5.**

BONA FIDE PURCHASER—

See **BILLS AND NOTES 10-12; HUSBAND AND WIFE 6.**

BONDS—

Of contractors, see **HIGHWAYS 2-4.**

1. *Action.—Parties.—Complaint.*—In an action on a bond, where the complaint discloses that plaintiffs were joint obligees under it, and also alleged that the payment for which recovery was sought had been made by one only of such obligees, the objection that he alone should have sued should have been presented by demurrer to the complaint for insufficiency of facts.

Pritchard v. Mines, 203, 207 (3).

2. *Action for Breach.—Verdict.—Answers to Interrogatories.*—In an action on a bond executed in connection with the exchange of real estate and conditioned that defendants should complete certain improvements on the property traded to plaintiffs, where the breach alleged was defendant's failure to pay for such improvements after their completion, answers by the jury to interrogatories showing that certain persons performed labor and furnished materials in the making of such improvements, that their respective claims were in certain designated amounts, that the grantee of defendants had conveyed to a third person who thereafter conveyed to grantee's wife, and that all claims were paid by check, but not showing who paid the claims, were not in conflict with a general verdict for plaintiffs.

Pritchard v. Mines, 203, 207 (2).

3. *Contractor's Bond.—Construction.—“Including”.*—The word “including” as used in the bond of a contractor, conditioned for the payment of all debts incurred in the prosecution of the work,

BONDS—Continued.

including labor and materials furnished, expresses the idea of a class comprehending as a part of its members certain things specifically mentioned or to which particular attention is directed, and the class indicated by the expression "debts incurred" is not necessarily exhausted by the specific debts referred to as growing out of labor performed and material furnished, so that the bond, literally interpreted secures the payment of all debts incurred in the prosecution of the work.

Title Guaranty, etc., Co. v. State, ex rel., 268, 279 (5).

BOUNDARIES—

See **WATERS AND WATERCOURSES** 1, 7.

1. *Riparian Rights.—Meander Lines.*—The doctrine of riparian ownership applies only where the watercourse is in fact the boundary of the lands to which the doctrine is sought to be applied, and where there is uncertainty as to whether the meander line or the watercourse was intended as the boundary, in determining such question reference must be had to the conveyance to the party claiming the application of such doctrine and to the time of such conveyance, and not to a remote time or conveyance.

State v. Tuesburg Land Co., 555, 602 (15).

2. *Surveys.—Natural Monuments.*—The influential reason for the rule favoring natural monuments over other calls in a survey, rests on the presumed intention of the parties to convey the lands actually surveyed, and the presumption that natural monuments are less likely to be mistaken than other calls, and include and bound the lands so surveyed; but where the reason for the rule does not exist, the rule itself ceases.

State v. Tuesburg Land Co., 555, 593 (13).

3. *Surveys.—Natural Monuments.*—Natural monuments will prevail as against other calls in survey.

State v. Tuesburg Land Co., 555, 587 (7).

BREACH—

Action for, see **CONTRACTS** 2, 3.

Complaint for damages for, of contract, see **DAMAGES** 1, 11.

Of warranty, see **SALES** 4.

BRIDGES—

Railroads, see **WATERS AND WATERCOURSES** 5, 6.

BRIEFS—

See **APPEAL** 29-33, 93.

BURDEN OF PROOF—

See **BILLS AND NOTES** 2, 13, 14; **FRAUD** 1; **LICENSES** 1; **QUIETING TITLE** 1.

Where plaintiff seeking recovery for goods lost in transit, has shown delivery of same to a carrier, and that they were not redelivered, he has made a *prima facie* case against the carrier, which places on the latter the burden to prove its freedom from liability, see **CARRIERS** 1.

CANCELLATION OF INSTRUMENTS—

See **CONTRACTS** 4.

CARRIERS—

1. *Carriage of Freight.—Liability.—Burden of Proof.*—Where plaintiff, seeking recovery for goods lost in transit, has shown delivery of same to a carrier, and that they were not redelivered, he has made a *prima facie* case against the carrier, which places on the latter the burden to prove its freedom from liability.

Chicago, etc., R. Co. v. Stouffer, 190, 193 (3).

2. *Carriage of Freight.—Liability.*—The liability of a carrier transporting merchandise does not terminate until such merchandise is unloaded from the car and delivered to the consignee, or is placed in a storehouse for that purpose; and, where the character of the shipment renders it impracticable or impossible of placement in the storehouse, the liability of the carrier as such does not end, in the absence of a contract to the contrary, until the car containing the merchandise is located at the place of destination where such cars are usually unloaded, or at some other convenient place at the request of the consignee.

Chicago, etc., R. Co. v. Stouffer, 190, 192 (1).

3. *Carriage of Freight.—Liability as Warehouseman.*—Where the evidence showed that a shipment of onions was not removed to a storage house, and there was no evidence to show that it was ever located on one of defendant's unloading tracks, or any other safe and convenient place, the liability of defendant was not changed from that of a common carrier to that of a warehouseman.

Chicago, etc., R. Co. v. Stouffer, 190, 193 (2).

4. *Carriage of Freight.—Liability as Warehouseman.*—Although a warehouseman is not an insurer and his liability is based on negligence merely, defendant carrier could not escape liability for a loss of freight even on the theory that its liability was only that of a warehouseman, where a *prima facie* case was made by showing a delivery to the carrier and no redelivery, and there was no evidence to overcome such *prima facie* case.

Chicago, etc., R. Co. v. Stouffer, 190, 193 (4).

5. *Carriage of Passengers.—Duty to Protect Passengers.*—A common carrier must protect its passengers against the misconduct of its own servants, and, as far as practicable, from violence committed by strangers and copassengers.

Chicago, etc., R. Co. v. Fisher, 10, 15 (1).

6. *Carriage of Passengers.—Misconduct of Fellow Passengers.—Duty of Carrier.*—While not insurers of the safety of passengers, it is the duty of a common carrier to protect them from the unprovoked assault or misconduct of a fellow passenger, where its servants have knowledge of the existing conditions in time to afford such protection, or where such servants have reason to anticipate that the safety of passengers is imperiled by the misconduct of a fellow passenger.

Chicago, etc., R. Co. v. Fisher, 10, 15 (2).

7. *Carriage of Passengers.—Injuries.—Misconduct of Fellow Passenger.—Complaint.*—In a passenger's action for injuries sustained by the act of a fellow passenger, a complaint showing the relation of passenger and carrier between plaintiff and defendant, that defendant's servants knew of a fight in another part of the train in which the fellow passenger participated, and of the latter's condition at and prior to the injury to plaintiff, that after such fight such fellow passenger, who was drunk, angry, etc., was negligently permitted to enter the coach in which plaintiff was riding, that he fell upon plaintiff and crushed and injured her, and that plaintiff's injury occurred wholly and by reason of the defendant negligently and wrongfully and carelessly failing to perform its duty, and in negligently and carelessly permitting said fellow passenger to enter the coach wherein plaintiff was seated, was sufficient to withstand a demurrer.

Chicago, etc., R. Co. v. Fisher, 10, 16 (3), 17 (3).

CASES—

DISAPPROVED IN PART:

Holthouse v. State, 49 Ind. App. 178, see *John Kindler Co. v. First Nat. Bank*, 79, 87 (5).

OVERRULED:

Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571, see *Watts v. Chicago, etc., R. Co.*, 51, 55 (5).

CAUSE OF ACTION—

Misjoinder of, see ACTION.

CERTAINTY—

Of exception, see APPEAL 10.

CERTIORARI—

When writ of, not granted, see APPEAL 13.

CHANGE OF GRADE—

See RAILROADS 2-4.

CLAIMS—

Action on, against estate, see EXECUTORS AND ADMINISTRATORS 1, 2.

COLLISION—

Automobile, see NEGLIGENCE 3, 4.

COMMISSIONS—

See CONTRACTS 5-7.

COMPENSATION—

Where a fund has been secured to the client by the efforts of his attorney, he is entitled to compensation for such services and equity will aid the attorney to enforce his claim, see ATTORNEY AND CLIENT 3.

COMPLAINT—

See PLEADING 3-14.

COMPROMISE AND SETTLEMENT—

Settlement of Litigation.—Attitude of Courts.—Settlements of litigation between the parties either in or out of court, when made in good faith, are commendable and should be encouraged, since they usually end the controversy and leave nothing for the court to do except to show a disposition of the case in accord with the settlement. *Hammond, etc., R. Co. v. Kaput*, 543, 549.(3).

CONCLUSIONS—

See PLEADING 1.

CONCLUSIVENESS—

See EVIDENCE 1.

Of finding, see APPEAL 76, 77.

Of verdict, see APPEAL 75; BILLS AND NOTES 10.

CONSIDERATION—

See **BILLS AND NOTES** 14, 15.

Where the, of a contract is not expressed, parol evidence is admissible to show same, see **CONTRACTS** 14.

CONSPIRACY—

Civil Liability.—Evidence.—In a civil action charging conspiracy positive evidence of a conspiracy is not essential, but the evidence will sustain the charge if when considered in its entirety it furnishes reasonable grounds to infer the essential facts.

Craig v. Norwood, 104, 114 (14).

CONSTITUTIONAL LAW—

The Appellate Court does not have jurisdiction to dispose of a case in which a constitutional question is properly raised and presented see **COURTS** 2.

Where the merits of the cause may be passed on without deciding a constitutional question the courts do so, see **APPEAL** 95.

The unconstitutionality of a law is not raised where neither the particular section claimed to be invalid, nor the particular constitutional provision claimed to be violated, is definitely pointed out, see **APPEAL** 4.

CONTRACTS—

See **CORPORATIONS** 4; **INSURANCE** 12; **LICENSES** 2; **RAILROADS** 27; **SPECIFIC PERFORMANCE** 1, 2.

Complaint for damages for breach of, see **DAMAGES** 1, 11.

With officers, see **MUNICIPAL CORPORATIONS** 1, 3.

A complaint seeking recovery *ex contractu* is inconsistent in theory with a recovery *ex delicto*, see **PLEADING** 6, 7.

Entered into by a public officer which make it possible for his personal interest to become antagonistic to his faithful discharge of public duty are void as being against public policy, see **OFFICERS**.

1. *Action.—Issues.—Liability.*—In an action by architects to recover for services rendered, where defendant filed a counterclaim alleging that the services were pursuant to an oral contract to superintend the construction of a building, and averring a breach thereof in that plaintiffs did not cause the building to be fully completed and that they had caused defendant to pay the contractors in full, all to his damage in a certain sum, the failure to complete the building was only involved to the extent that such facts showed or tended to show that defendant was damaged by plaintiff's alleged violation of their contract, and the measure of plaintiff's liability was the amount of money which they wrongfully caused defendant to pay in ignorance of the fact that it was not due, not exceeding in any event the amount required to complete the building at the contract price.

Bump v. McGrannahan, 136, 144 (6).

2. *Action for Breach.—Findings.*—In an action on a contract, where there was no finding that plaintiff performed his part of the contract, nor of any fact on which substantial damages could be based, while on the other hand there were findings showing non-performance by plaintiff, and that plaintiff was himself responsible for the failure of the enterprise which was to be developed, all supported by the evidence, the judgment for defendant can not be disturbed.

Roder v. Niles, 4, 9 (4), 10 (4).

3. *Breach.—Complaint.—Answer.*—In an action for breach of a contract of employment, where the complaint was on the theory that

CONTRACTS—Continued.

the contract was originally in parol and afterwards reduced to writing, and it was manifest therefrom that certain obligations on the part of the plaintiff had been omitted from such writing, so that the writing was more in the nature of a memorandum than a definite contract, it was competent for defendant to aver by answer what the omitted provisions were and to prove same by parol, since under the circumstances the contract must be deemed in parol and is controlled by the law governing parol contracts.

Roder v. Niles, 4, 8, (2).

4. *Cancellation of Instruments of Defeasance.—Conveyances.*—An agreement for the cancellation of an instrument that was executed contemporaneously with a deed of conveyance and provided for a reconveyance to grantor on his performance of certain conditions, is not a conveyance within the meaning of §3957 Burns 1914, §2926 R. S. 1881.

Raub v. Lemon, 59, 71 (4).

5. *Commissions.—Sales of Real Estate.*—In an action by one seeking the collection of commission for services rendered against the owner of real estate disposed of, plaintiff must show a substantial compliance with the statute requiring the contract to be in writing in order to recover.

Luther v. Bash, 535, 539 (2).

6. *Commissions.—Sales of Real Estate.—Statutes.*—While the manifest purpose of the statute (§7463 Burns 1908, Acts 1901 p. 104) requiring contracts for the payment of commissions for the sale of real estate to be in writing was to protect owners of real estate against imposition and fraud on the part of real estate agents, it was not intended to enable the landowner to commit fraud or imposition upon the agent; and hence, while the statute must be substantially complied with, its operation should not be extended further than necessary to make its spirit and purpose effective.

Luther v. Bash, 535, 539 (3).

7. *Commissions.—Sales of Real Estates.—Statutes.*—Under §7463 Burns 1908, Acts 1901 p. 104, requiring contracts for the payment of commissions for the sale of real estate to be in writing, a contract to pay brokers two per cent of cash or property received in trade for a farm, was enforceable against the owner of such farm, who had declined to convey after a purchaser had been procured, although the exact amount of commission could not be ascertained without the aid of parol evidence, since the reception of such parol evidence would be merely explanatory to aid the court in applying the contract to the subject-matter, and could not be deemed as supplying any essential part of the contract.

Luther v. Bash, 535, 540 (5).

8. *Construction.—Admissibility of Parol Evidence.*—Where a contract is ambiguous and uncertain, and its language admits of more than one construction, parol evidence of prior and contemporaneous negotiations and statements may be admitted and considered to aid in its construction, and the contract should be enforced as thus interpreted.

Smith v. Toth, 42, 49 (3).

9. *Construction.—Admissibility of Parol Evidence.*—A written contract, clear and unambiguous, should be interpreted solely from a consideration of its terms, and enforced as thus interpreted; hence if the court hears parol evidence for the purpose of clarifying such a contract and gives effect to it as thus interpreted, the decision is contrary to law.

Smith v. Toth, 42, 48 (2).

10. *Interest in Real Estate.—Validity of Contract.*—An instrument in the form of a deed conveying and warranting "the right to take gravel, sand and soil" to be paid for at a certain price for each cubic yard taken, providing that the grant shall be perpetual, duly signed

CONTRACTS—Continued.

and acknowledged by both parties and recorded, must be treated as the conveyance of a voluntary interest in land, and was valid as between the parties and their privies.

Wenger v. Clay Tp., 640, 641 (2), 643 (2).

11. *Interest in Real Estate.—Profit a Pendre.*—The right to enter upon the lands of another and remove such portions of the soil as is granted is termed a *profit a pendre*, and it takes the character of an interest or estate in the land itself, rather than that of a proper easement, and may be held in fee, for life or for years; but a contract to sell gravel, sand and soil from one's land, while attached to the land, may be so worded as to pass no title until the same is severed from the land. *Wenger v. Clay Tp.*, 640, 642 (3).

12. *Matter Implied.*—Whatever may be fairly implied from the terms or nature of an instrument is, in the judgment of law, contained in the instrument and is as much a part thereof as that which is expressed.

Luther v. Bash, 535, 540 (4).

13. *Oral Contracts.—Province of Court and Jury.—Instructions.*—It is the duty of the court to construe and state the legal effect of an oral contract, the same as in the case of written contracts; but where the terms of an oral contract are in dispute and its meaning doubtful, the court should submit the questions of fact to the jury to be determined from the evidence and state the law applicable thereto in hypothetical instructions; hence an instruction advising the jury that it was for the jury to construe the oral contract sued on was erroneous.

Bump v. McGrannahan, 136, 140 (3).

14. *Proof of Consideration.*—Where the consideration of a contract is not expressed, parol evidence is admissible to show same.

Roder v. Niles, 4, 8 (3).

CONTRIBUTORY NEGLIGENCE—

See MUNICIPAL CORPORATIONS 2; NEGLIGENCE 6, 7, 15; RAILROADS 7-12, 30.

CONVEYANCES—

See CONTRACTS 4.

CORPORATIONS—

1. *Directors.—Delegating Powers.*—Although a board of directors may for the term of its existence delegate its powers involving discretion to a board of managers, it can not do so beyond recall for a period extending long beyond such term.

Shaw v. Bankers Nat. Life Ins. Co., 346, 357 (5).

2. *Insurance.—Articles.—Unnecessary Provisions.*—A provision in the articles of incorporation of an insurance company organized under §4739 *et seq.* Burns 1914, Acts 1897 p. 318, creating a board of general managers consisting of three members to be appointed by the directors, was not required by the statute, and could have no greater force or effect than as a by-law.

Shaw v. Bankers Nat. Life Ins. Co., 346, 355 (2).

3. *Insurance.—Board of Managers.—Contract.—Termination.*—Where a contract between a life insurance company and three persons designated as a board of managers was entered into by the company because each member of such board was understood to be an expert in a field pertaining to life insurance distinct from that in which the others were understood to be efficient, so that a combination of such skill and knowledge would thereby be procured,

CORPORATIONS—Continued.

such contract was terminated by the retirement of two of such persons, since it was impossible for the company to thereafter receive the benefit of the skill and knowledge contemplated.

Shaw v. Bankers Nat. Life Ins. Co., 346, 356 (3).

4. *Insurance.—Board of Managers.—Exercise of Power.—Contract.*—Where the by-laws of an insurance company provided for a board of managers consisting of three members to be appointed by the directors, that the powers conferred should be exercised by them jointly, and that the majority voice of the managers should prevail in all things, the provisions of a contract executed pursuant thereto between the company and the persons designated as managers must be deemed to have contemplated joint action after consultation, and as conferring authority to act only as a board, so that the withdrawal of a majority of the members destroyed the existence of the board and the remaining member was unable to exercise its powers.

Shaw v. Bankers Nat. Life Ins. Co., 346, 354 (1), 355 (1).

5. *Insurance.—Contract with Managers.—Rescission for Fraud.*—False and fraudulent representations of three of the organizers of an insurance company, who were also members of its board of directors, that they had procured the requisite applications to entitle the company to be incorporated, being one of the potent factors in inducing the board of directors to execute a contract naming them as the board of managers justified the directors in rescinding the contract on ascertaining the facts.

Shaw v. Bankers Nat. Life Ins. Co., 346, 357 (4).

6. *Sale of Stock.—Rescission.—Fraud.*—A sale induced by fraud is not void, but voidable; hence, where plaintiff was induced by fraud to purchase stock in an oil company, the purchase money could not be recovered until rescission and tender of return of the stock in case it was of any value.

Barnard v. First Nat. Bank, 634, 635 (1).

COSTS—

1. *Stay of Subsequent Action Until Payment.—Discretion of Court.*—An application to stay proceedings for nonpayment of the costs in a former suit is addressed to the sound discretion of the trial court, and its action will be reviewed when an abuse of such discretion appears.

Craig v. Norwood, 104, 109 (3).

2. *Stay of Subsequent Action Until Payment.*—The exercise of authority to stay proceedings for nonpayment of the costs of a prior suit should be governed by the facts and circumstances of each case, and a stay should never be granted unless it appears to the court that the subsequent suit is without merit and vexatious.

Craig v. Norwood, 104, 109 (5).

3. *Stay of Subsequent Action Until Payment.*—The rule that while the costs of a dismissed action remain unpaid the commencement of a subsequent action for the same thing will be deemed vexatious, and will be stayed on proper application until the costs of the former action have been paid, does not apply where plaintiff shows affirmatively that the subsequent action is brought in good faith.

Craig v. Norwood, 104, 108 (1).

4. *Stay of Subsequent Action Until Payment.—Discretion of Court.*—In view of the constitutional provisions that the courts shall be open to every man and that justice shall be administered freely, a party may bring and prosecute his action to final judgment regardless of the number of actions he has previously brought for the same cause of action, unless it appears that he is simply bringing such actions to harass and annoy, or that they are vexatious and

COSTS—Continued.

without merit, and therefore an abuse of the court's discretion in refusing to stay proceedings until payment of costs is not conclusively shown merely by the fact that plaintiff had brought two prior actions for the same thing in which the costs were unpaid.
Craig v. Norwood, 104, 109 (4).

COUNTER CLAIM—

See PLEADING 3, 4.

COURTS—

1. *Appellate Court.—Following Decisions of Supreme Court.*—Although a cause in the Appellate Court involves questions as to which there is apparent conflict in the decided cases of the Supreme Court, where the principle on which the opinion must be based has been given recognition in both the earlier and later of those decisions, as well as in those of the United States Supreme Court, the Appellate Court is not deprived of jurisdiction under §1394 Burns 1914, Acts 1901 p. 565, but may follow those cases which it may deem to be supported by the better reason and authority.
State v. Tiesburg Land Co., 555, 607 (17).
2. *Jurisdiction.—Constitutional Questions.*—The Appellate Court does not have jurisdiction to dispose of a case in which a constitutional question is properly raised and presented.
Cole Motor Car Co. v. Ludorff, 119, 128 (10).
3. *Records.—Correction Nunc Pro Tunc.*—The minute on the court's bench docket, "instructions as given and refused filed," was a sufficient memorandum to authorize a correction of the record *nunc pro tunc* so as to affirmatively show that the instructions given and refused were filed.
Pittsburgh, etc., R. Co. v. Lamm, 389, 391 (1).
4. *Records.—Correction Nunc Pro Tunc.*—Though a party by mistake to his detriment had the clerk change his correct entry made from the court's minutes, he was not thereby precluded from the right to a correction *nunc pro tunc* to have the record speak the truth, in the absence of anyone having been misled.
Pittsburgh, etc., R. Co. v. Lamm, 389, 391 (2).
5. *Rules.—Construction.—Appeal.*—The rules of a trial court are construed to be the law of the court made for the orderly conduct of business and for the protection of litigants, and on appeal the construction placed by a trial court on its rules of practice will be adopted unless it clearly appears that there has been substantial error in their construction and application.
Cleveland, etc., R. Co. v. Cloud, 256, 260 (2).

CROSSINGS—

Accidents on, see RAILROADS 6-19.

CUMULATIVE EVIDENCE—

See NEW TRIAL 3.

DAMAGES—

See APPEAL 51; FRAUD 6; HUSBAND AND WIFE 16; RAILROADS 3, 5, 28.
 Excessive, see DEATH 3, 4.

From negligent work, see RAILROADS 4.

Unliquidated, see APPEAL 99.

1. *Breach of Contract.—Complaint.*—A complaint for breach of contract providing a penalty of \$3,000 for its breach, alleging the several obligations of the contracting parties and averring that

DAMAGES—Continued.

defendant has failed and refused to comply, to plaintiff's damage in the sum of \$3,000, was not insufficient as the statement of a cause of action for actual damages, although it also stated facts that would have been sufficient for a recovery on the theory of liquidated damages, had the contract so provided.

Eikenberry v. Thorn, 468, 477 (8).

2. *Complaint.—Evidence.—Instructions.*—In an action for personal injuries, where the complaint alleged that plaintiff was a house-keeper and did her own sewing before she was injured, and that after receiving the injuries she was unable to perform any labor, was an invalid, and permanently unable to perform any household duties, and the evidence showed that plaintiff was an unmarried woman, an instruction authorizing the jury to consider loss of time as an element of damages was warranted.

Cole Motor Car Co. v. Ludorff, 119, 129 (13).

3. *Failure to Assess Nominal Damages.—Harmless Error.*—Even though plaintiff is entitled to nominal damages, a failure to assess such damages is not ground for reversal. *Roder v. Niles*, 4, 10 (5).

4. *Instructions.—Refusal.*—There was no error in the refusal of an instruction setting forth that certain matters should not be considered in arriving at the measure of damages, where the court gave an instruction specifying what elements should be considered.

Chicago, etc., R. Co. v. Fisher, 10, 18 (7).

5. *Liquidated.—Stipulation Controlling.*—Where it appears from the whole instrument that the parties knowingly mutually agreed in advance upon a definite amount to be paid in case of a breach or repudiation of the contract, such agreement will control unless it is inconsistent with other provisions of the contract, or is unreasonable or unconscionable in view of the probable damages that may result from a breach.

Eikenberry v. Thorn, 468, 475 (2).

6. *Liquidated.—Enforcement.*—Where the parties have deemed it difficult to determine the actual damages in case of a breach of their contract, or for some other reason satisfactory to them and mutually understood at the time, have deemed it advisable to agree upon a sum, in advance of such possible breach, as liquidated, and have advisedly so stipulated in the contract, the courts will respect and enforce such stipulations.

Eikenberry v. Thorn, 468, 475 (4).

7. *Liquidated or Penalty.—Construction.—Intent.*—The provisions of a contract relating to the damages that may result from its breach are to be interpreted so as to carry out the intent of the parties when they executed the instrument.

Eikenberry v. Thorn, 468, 474 (1).

8. *Liquidated or Penalty.—Words Used.*—In determining the question of whether a contract provides for the payment of liquidated damages in case of its breach, or a penalty merely, the use of particular words or phrases, such as "damages", "penalty", "forfeit", "liquidated damages", and the like is not conclusive, but the words or phrases used are to be considered in connection with the other provisions of the contract.

Eikenberry v. Thorn, 468, 475 (3).

9. *Liquidated or Penalty.—Any of Several Acts.*—Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and provides for payment of a definite sum upon a violation of any or all of such provisions, and the sum stipulated would be in some instances too large and in others too small a compensation for the loss of injury sustained, the stipulated amount will be regarded as a penalty and not as liquidated damages.

Eikenberry v. Thorn, 468, 475 (5).

DAMAGES—Continued.

10. *Liquidated or Penalty.—Doubt.*—Where the contract leaves the question in doubt, the amount stipulated to be paid in case of a breach will generally be construed as a penalty rather than as liquidated damages, since the party may still recover the actual damages sustained by the breach.

Eikenberry v. Thorn, 468, 475 (6).

11. *Penalty.—Breach of Contract.*—Where a contract for the exchange of mercantile stock for real estate provided for the doing of numerous things of varying importance, such as the furnishing of an abstract in five days, the exchange of insurance, the assignment of a lease, the delivery of the deeds within a specified time, etc., the provision that "both parties further agree that should either one fail to comply with the conditions herein he will pay the other \$3,000 in damages", was subject to the interpretation that failure to comply with any one of the requirements would subject the defaulting party to the payment of damages, or at least was not free from doubt as to whether it was intended to fix the amount of damages only in case of a total failure to close the deal in substantial compliance with the contract, and hence must be deemed as providing a penalty rather than liquidated damages.

Eikenberry v. Thorn, 468, 476 (7).

DEATH—

1. *Wrongful Death.—Action by Administrator.*—An administrator's action for the wrongful death of his decedent is wholly dependent upon the statute, and in the absence of a survivor who has sustained a pecuniary loss by the death of the decedent there is no right of action. *Chicago, etc., R. Co. v. Biddinger*, 419, 425 (2).

2. *Wrongful Death.—Action by Administrator.—Pecuniary Interest of Persons for Whom Action is Maintained.—Complaint.*—In an administrator's action for the wrongful death of his decedent, the allegation that there are persons to whom, under the statute, the damages will enure, renders the complaint sufficient in that respect without the allegation that the persons for whose benefit the action is brought have a pecuniary interest in the life of the decedent.

Chicago, etc., R. Co. v. Biddinger, 419, 426 (4).

3. *Excessive Damages.—Review.*—Where decedent was twenty-three years of age, of good health, a bright, active woman, of kindly temperament, economical and industrious in her habits, familiar with and able to perform the duties that fell to her lot as a farmer's wife, a verdict for \$3,000 in an administrator's action for the benefit of her husband was not excessive.

Chicago, etc., R. Co. v. Biddinger, 419, 439 (19).

4. *Excessive Damages.*—A verdict of \$6,000 for the death of plaintiff's decedent was not excessive, in view of evidence showing that decedent was twenty-one years of age, strong and industrious, had no bad habits, used all his earnings to support his wife and maintain his home, was a brick mason earning four to five dollars a day, that he had a life expectancy of forty years, and that he worked at his trade from eight to nine months each year and performed other labor during the remainder of each year.

Cleveland, etc., R. Co. v. Cloud, 256, 267 (6).

DECEIT—

See **FRAUD 2.**

DEEDS—

Covenants Running With Land.—Maintenance of Fences.—Provisions in deeds to maintain fences are covenants running with the land.

Union Traction Co. v. Thompson, 183, 185 (1).

DEFECTS—

Knowledge of, see MASTER AND SERVANT 7.

DELINQUENCY—

Contributing to, of minor, see APPEAL 1.

DEMAND—

See SALES 3.

DEMURRER—

See PLEADING 16, 17.

DEPOSITIONS—

Motion to suppress should be made before entering on the trial, see TRIAL 1.

Defective Notice.—Waiver.—A party by attending the taking of a deposition and cross-examining the witness waives a defect in the notice. *Voorhees v. Cragun*, 690, 702 (8).

DEPOSITS—

See BANKS AND BANKING 1.

DIRECTING VERDICT—

See APPEAL 54-56; TRIAL 5-7.

Alleged error in, is properly presented by assignment as cause for a new trial, see APPEAL 9.

DIRECTORS—

See CORPORATIONS 1.

Delegating powers, see CORPORATIONS 1

DESCENT AND DISTRIBUTION—

1. *Adoption.—Capacity to Inherit.*—The act of adoption does not take away any existing rights, or destroy the legal capacity to inherit from natural parents. *Head v. Leak*, 253, 255 (1).
2. *Adoption.—Heir in Dual Capacity.*—Where an adopted child of an intestate has a right to property of the decedent either in the capacity of an adopted child or as natural heir, but not in both, it should receive the greatest amount it would be entitled to receive in either capacity. *Head v. Leak*, 253, 255 (2).
3. *Adoption.—Heir in Dual Capacity.*—Where decedent left surviving him his widow, four sons and an adopted daughter who was the only child of a deceased son, such adopted daughter should take as natural heir, and not as an adopted child, since under the circumstances her rights are greater as a natural heir, in view of the limitation upon the descent of property taken by an adopted child, contained in §870 Burns 1914, Acts 1883 p. 61. *Head v. Leak*, 253, 255 (3).
4. *Rights of Heirs to Settle Estates.—Action by Heirs.*—Where an intestate dies under circumstances making administration on his estate unnecessary, and none is had, the heirs at law may sue in their individual names to recover a demand due decedent in his lifetime, but they must allege and prove that there is no administration pending, since so long as there is an administrator he is entitled to recover all debts due the estate. *Craig v. Norwood*, 104, 111 (9).

DISCRETION OF COURT—

See **APPEAL 74**; **COSTS 1, 4**; **PLEADING 18**.

DISMISSAL—

See **APPEAL 34, 35**.

DIVORCE—

Alimony.—Security.—Statutes.—Under §1088 Burns 1914, §1047 R. S. 1881, providing that the court in its discretion may allow alimony to be paid by installments on sufficient security being given, and that if the surety required be not given within thirty days the whole amount of alimony shall be due, plaintiff in a divorce case could not avoid execution against him for alimony under a decree providing for payment by installments, on the theory that the installments were not due and that pursuant to an agreement no surety was required, since the alleged agreement did not appear from the decree, and though the decree was silent as to the requirement of surety the provisions of the statute were to be read into it.
Laufer v. Laufer, 508, 510 (2).

EJECTMENT—

1. **Title of Plaintiff.—Pleading and Proof.**—Plaintiff, in an action of ejectment, alleging legal title to the real estate in controversy, is bound thereby and can not recover on proof of an equitable title.
Raub v. Lemon, 59, 67 (1).
2. **Title of Plaintiff.—Evidence.—Review.**—Where plaintiff in ejectment alleged legal title in himself, and introduced in evidence a deed absolute on its face, as well as an unrecorded contemporaneous instrument purporting to be a contract of purchase and sale whereby the real estate involved was to be conveyed to defendant upon his performance of the conditions therein recited, and there was no evidence to show that the deed to plaintiff together with such contemporaneous instrument constituted a mortgage, it was error for the trial court to limit the probative scope of a subsequent writing, whereby defendant surrendered all rights under such contemporaneous instrument, to consideration merely upon the question of plaintiff's right to possession and not upon the question of title; and, even on the assumption that plaintiff's deed was in fact a mortgage and the contemporaneous instrument a defeasance, the ruling of the court can not be sustained, since, there being no showing to the contrary, it must be presumed that the subsequent surrender of defendant's rights under the defeasance was *bona fide* and sufficient to preclude defendant from equitable relief on the theory of "once a mortgage always a mortgage".
Raub v. Lemon, 59, 68 (2), 72 (2), 78 (2).

ELECTION—

Of widow in estate, see **WILLS 7**.

EMPLOYES—

Of railroads, see **MASTER AND SERVANT 1**.

EMPLOYERS' LIABILITY ACT—

See **MASTER AND SERVANT 1, 5**.

EQUITY—

Will aid an attorney to enforce his claim for services where through his efforts the client secured funds, see **ATTORNEY AND CLIENT 3**.

EQUITABLE LIENS—

See **LIENS**.

ESTATES—

Claims against, see **EXECUTORS AND ADMINISTRATORS 2**.

Postponement of, see **WILLS 1**.

Vesting of, see **WILLS 6**.

ESTOPPEL—

See **ADVERSE POSSESSION 2; INSURANCE 7-9; MORTGAGES 2**.

EVIDENCE—

See **BILLS AND NOTES 3, 4, 9, 10, 18; CONSPIRACY; DAMAGES 2; EJECTMENT 2; EXECUTORS AND ADMINISTRATORS 1; EXCEPTIONS, BILL OF 1, 2; FRAUD 4, 9; HIGHWAYS 1; INSURANCE 17; MASTER AND SERVANT 6; MORTGAGES 4; NEGLIGENCE 4, 9; RAILROADS 11, 23, 28; SALES 3-5**.

Admission of, see **APPEAL 83, 84**.

Instruction applicable to, see **APPEAL 49**.

Sufficiency of, see **APPEAL 41-44**.

Reception of, see **TRIAL 3, 4**.

Review as to, see **Appeal 36-44**.

Weight of, see **APPEAL 42, 43**.

Where, of either a written or verbal sale was admissible, see **PLEADING 2**.

Tax schedule is competent, where the evidence shows that plaintiff purchased the note for full value but the tax schedule fails to show the listing of the note, see **BILLS AND NOTES 3**.

1. *Affidavits.—Conclusiveness.—Admissions.*—An affidavit filed by the occupant of premises in aid of a motion to dissolve a restraining order against him further holding possession, asserting that his right to occupy the premises after the expiration of the lease was extended to February 1, 1910, was binding upon him as an admission in a subsequent action for forcible entry and detainer.
Hammond Sav., etc., Co. v. Boney, 295, 299 (2).

2. *Admissions.—Parol Evidence.*—Verbal admissions should be received as evidence with caution. *Elliot v. Elliot*, 209, 216 (7).

3. *Expert Testimony.—Offer of Evidence.*—An offer of a nonexpert's testimony should not be made without an offer of the facts on which it was based.

Pittsburgh, etc., R. Co. v. Kephert, 621, 627 (5).

4. *Parol Evidence.—Consideration for Deed.*—Where parol evidence admitted over the objection of appellants went no further than to explain the consideration for the conveyance involved, there was no error in admitting the same.

Wachstetter v. Johnson, 659, 678 (12).

5. *Presumptions.—Repair of Bridge.*—There is no legal presumption that a railroad bridge was skillfully and carefully repaired, and that the company did nothing unlawful; but such questions are matters of proof.

Southern R. Co. v. Weidenbrenner, 314, 319 (3).

6. *Written.—Parol Evidence to Explain.*—In an action to recover for medicinal water sold pursuant to a written order calling for "136 cs Large Water, price 3.50, 25 cs Large Ginger Ale, price 5.00, 5 casks R. B. pts. Imp. Style ale, price 7.00", etc., parol testimony showing that "cs" meant "cases", that "large water" meant "large

EVIDENCE—Continued.

water bottles holding one-fifth of a gallon", that "R. B. pts. Imp. Style" meant "round bottom pints imported style", and that the figures in the price column meant price in dollars per case or case, was properly admitted, since the order was in itself ambiguous.

Goldberger v. Arcadian, etc., Springs Co., 1, 2 (2).

EXCEPTIONS—

See APPEAL 5, 10, 11; NEGLIGENCE 16.

In a life insurance policy, see INSURANCE 2.

EXCEPTIONS, BILL OF—

1. *Filing.—Extension of Time.—Appeal.—Record.—Evidence.*—Where the trial court granted ninety days for the filing of a bill of exceptions containing the evidence, and at the subsequent term, without notice to the opposite party or attorneys, entered an order purporting to extend the time for filing, and such bill was filed after the expiration of the original time granted, but within the extended period, such bill was not a part of the record on appeal and the omission precluded a consideration of questions depending on the evidence. *Prichard v. Mines, 203, 206 (1).*
2. *Time for Filing.—"Reextension".*—Under §661 Burns 1914, Acts 1911 p. 193, providing for the extension of time for filing a bill of exceptions, the granting of time beyond the term is in fact one extension of the time, and the word "reextension" as used in the statute applies to and is limited to the first extension obtained as after the extension beyond the term; hence a bill of exceptions not filed within the time as thus limited is not a part of the record on appeal. *Dietrich v. Minas, 333, 342 (6).*

EXCESSIVE DAMAGES—

See DEATH 3, 4.

EXECUTION—

See JUDGMENT.

EXECUTORS AND ADMINISTRATORS—

1. *Action on Claim Against Estate.—Evidence.—Sufficiency.*—In an action on a claim against a decedent's estate, based upon an alleged agreement by decedent to pay interest to plaintiff on an agreed valuation on land conveyed by the plaintiff, where the deeds of conveyance executed by plaintiff were silent as to the agreement contended for by him, evidence consisting of such deeds, a memorandum by decedent referring to a settlement between himself and plaintiff showing a balance of \$48 interest due plaintiff in 1892, together with the testimony of two witnesses that decedent had admitted that he owed plaintiff interest and that plaintiff was to receive 6 per cent on the valuation of each 20-acre tract conveyed, precluded the court on appeal from disturbing the verdict for plaintiff, although there was evidence showing the plaintiff had depended on decedent for years and that no payment of interest had been made during a period of fifteen years, and notwithstanding that plaintiff's introduction of the deeds in evidence placed upon him the burden of showing the true consideration. *Elliot v. Elliot, 209, 215 (6), 216 (6).*
2. *Claims Against Estates.—Witnesses.—Competency of Claimants.*—Under §523 Burns 1914, §500 R. S. 1881, a plaintiff in an action against a decedent's estate is a competent witness on his own be-

EXECUTORS AND ADMINISTRATORS—Continued.

half concerning matters testified to by witnesses for the estate as to conversations with the claimant and not had in the presence of the decedent.

Elliot v. Elliot, 209, 214 (4).

3. *Necessity of Administration.*—On the death of an intestate leaving no widow and having no debts, and there is nothing to be done by way of administration of the estate except to divide it among the heirs at law, such heirs may settle the estate without an administrator, and they may resist the appointment of one or procure the removal of one who has been appointed.

Craig v. Norwood, 104, 111 (8).

4. *Powers of Administrators.—Right to Sue.*—Administrators possess the same rights and powers with respect to the personal estate as the decedent had in his lifetime, and they can maintain actions for trespass or injuries committed either before or after the decedent's death, and have full authority to prosecute any suit which he might have prosecuted in his lifetime, and they alone are authorized to bring an action for the conversion of personal property owned by the decedent at the time of his death; hence an action charging defendants with conspiring to fraudulently procure the money and property of a decedent and with having fraudulently converted the same to their own use, was properly brought by the administrator.

Craig v. Norwood, 104, 112 (11).

5. *Recovery of Property.—Complaint.—Sufficiency.*—A complaint by an administrator for the recovery of the property of his intestate, alleging that the intestate was enfeebled in body and mind by age, that defendants knowing his infirmity conspired to obtain fraudulently for themselves all his property, that they induced him to sell his real estate, and that they converted notes and bank accounts aggregating a specified sum, out of which they distributed a portion to certain heirs and converted the balance to their own use, etc., stated a cause of action.

Craig v. Norwood, 104, 112 (12).

6. *Right to Sue.*—The right of an administrator to sue can be questioned only by a plea in abatement.

Craig v. Norwood, 104, 111 (10).

EXPERT TESTIMONY—

See EVIDENCE 3.

FEDERAL SWAMP LAND ACT—

Patents issued under, see PUBLIC LANDS 2.

FEES—

Attorney, see ATTORNEY AND CLIENT 1-3.

In a partition proceeding in which both sides are represented by attorneys, the trial court may in its discretion deny the request of plaintiff to allow fees to be paid to his attorney as a part of the costs of the suit, see PARTITION.

FENCES—

See RAILROADS 21.

Provisions in deeds to maintain, are covenants running with the land, see DEEDS.

FORCIBLE ENTRY—

What constitutes, see LANDLORD AND TENANT 1.

FORCIBLE ENTRY AND DETAINER—

1. *Statutes.—Construction.*—"Or"—"And".—The word "or" should be read "and" in the first relative clause of §8083 Burns 1914, §5237 R. S. 1881, providing that "any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having the right of possession thereof; or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same against any person having the right to possession thereof, may be ousted from such premises", etc.

Hammond Sav., etc., Co. v. Boney, 295, 303 (3).

2. *Statutory Provisions.—Scope.*—Only persons having right to possession of the lands involved come within the protection of the forcible entry and detainer statute (§8083 Burns 1914, §5237 R. S. 1881), and under its provisions, the possession can not be changed against the person who actually has it under a claim of right, without the intervention of legal procedure.

Hammond Sav., etc., Co. v. Boney, 295, 304 (4).

3. *What Constitutes.*—A forcible entry or a forcible holding is more than a mere trespass, and to constitute such entry or holding by possession must have been taken or kept either by actual violence or by such show of force as was reasonably calculated to intimidate the rightful owner.

Hammond Sav., etc., Co. v. Boney, 295, 305 (5).

FORECLOSURE—

Where wife not made a party to, proceeding she can redeem her one-third interest after the death of her husband, see **HUSBAND AND WIFE 3**.

FORFEITURES—

Of right to insurance are not favored in law, see **INSURANCE 6-9**.

FRAUD—

See **BILLS AND NOTES 13**; **RELEASE**; **SALES 5**.

Rescission for, see **CORPORATIONS 5, 6**.

Where plaintiff's attorney after judgment took a lien for his fee and pending an appeal by the defendant settlement was made between the parties without the knowledge or consent of plaintiff's attorney, this was a constructive fraud on the attorney and he may enforce his rights regardless of the settlement, see **ATTORNEY AND CLIENT 2**.

1. *Burden of Proof.—False Representations.—Knowledge.*—In an action for damages for false representations in the sale of a horse, plaintiff must prove that defendant knew that the horse was not as represented, or that he was chargeable with such knowledge.

Kirk v. Trabue, 466 (1).

2. *Deceit.—Nonessential Representations.*—In an action for fraud on plaintiff in the sale to him of certain corporate stock, where the complaint proceeded on the theory that representations by defendant as to the undesirability of retaining in the company the man whose stock was purchased were made for the purpose only of getting plaintiff in a frame of mind to consider the purchase of such stock, thus rendering easier of accomplishment defendant's sale to plaintiff of such stock at par after he, the defendant, had arranged for its purchase from the owner at much less than par, the fact that the representations as to the owner of such stock were true was of no avail to defendant, since the falsity thereof was not essential to plaintiff's cause of action.

Voorhees v. Cragun, 690, 696 (1).

FRAUD—Continued.

3. *Defenses.—Laches.*—While the right to prosecute an action may be barred if plaintiff has been guilty of such laches in bringing same as to work an equitable estoppel, where the action is one at law to recover damages for fraud, and the situation of the parties has not changed, and the interest of no third party has intervened, a defense of laches founded on mere delay can not prevail.
Voorhees v. Cragun, 690, 701 (6).
4. *Evidence.—Sufficiency.*—Fraud need not be proved by a particular kind or class of evidence, but to sustain a finding of fraud there must be some evidence from which fraud may be reasonably inferred.
Aultman, etc., Mach. Co. v. Shell, 19, 24 (3).
5. *False Representations.—Basis of Action.*—Representations relied upon as the basis of an action for fraud must relate to a material existing fact, and mere opinions as to value, or representations or promises as to what one can or will do in the future will not furnish the basis for such an action.
Voorhees v. Cragun, 690, 696 (2).
6. *Misrepresentation.—Damages.*—Where false statements as to cost of property, made in representing its value, are such as to constitute actionable fraud, the measure of damages is the difference between the actual value and the value as represented; but where property is sold at what is represented to be its cost to the seller, so that the cost price is a material part of the agreement, any sum paid above such cost price would be the measure of damages.
Voorhees v. Cragun, 690, 699 (4).
7. *Misrepresentation.—Failure to Investigate.*—Where defendant, in inducing plaintiff to purchase stock held by the superintendent of a corporation in which they were each interested, told plaintiff that only he, the defendant, could negotiate the purchase, that it would not do to let such superintendent know that any other than defendant was interested in such purchase, which defendant represented would be made at par, etc., when as a matter of fact defendant already arranged for its purchase below par, the contention by defendant, in an action against him by plaintiff to recover for the fraud, that plaintiff should have investigated before buying and paying for the stock was unavailable.
Voorhees v. Cragun, 690, 700 (5).
8. *Misrepresenting Price of Corporate Stock.*—Where defendant by falsely representing that in purchasing eighty-one shares of corporate stock he had to pay \$100 a share, when in fact he had arranged for its purchase for \$6,000, by reason of which representation plaintiff paid defendant \$8,000 for eighty shares, defendant was liable to plaintiff for the difference, since a person who arranges to sell to another property at cost price to him, and by false representations as to such price induces the purchaser to pay an excess, is liable to the purchaser for the difference even though the property may be worth the amount paid by the latter.
Voorhees v. Cragun, 690, 697 (3).
9. *Parties.—Liability.—Evidence.*—In an action against two defendants for damages for fraudulent representations in the sale of a horse, where the evidence showed that one of the defendants had no interest in the horse, although the check given in payment for same was made payable to him, the court did not err in instructing the jury that a verdict should be returned in his favor.
Kirk v. Trabue, 466, 468 (3).
10. *Pleading.—Amendment.*—In an action for fraud in the sale of certain corporate stock, there was no error in permitting plaintiff, at the conclusion of the evidence, to amend the complaint to show that the purchase was in writing, since the complaint was based on tort and its sufficiency was not affected by the amendment.
Voorhees v. Cragun, 690, 703 (10).

FRAUDS, STATUTE OF—

Requirement of Writing.—Compliance.—Generally a contract required by law to be in writing must be wholly so in order to be enforceable as a written contract, since a contract partly in writing and partly in parol is a parol contract. *Luther v. Bash*, 535, 539 (1).

FREIGHT—

Carriage of, see **CARRIERS** 1-4.

GRADE—

Change of, see **RAILROADS** 2.

GOOD FAITH—

Briefs showing a, effort and substantial compliance with Rule 22 will be considered, see **APPEAL** 31.

“GROSS”—

See **WORDS AND PHRASES** 1.

HARMLESS ERROR—

See **APPEAL** 83-92; **DAMAGES** 3.

HEIRS—

Action by, see **DESCENT AND DISTRIBUTION** 4.

In dual capacity, see **DESCENT AND DISTRIBUTION** 2, 3.

HIGHWAYS—

1. *Action on Contractor's Bonds.—Assignments.—Evidence.*—In an action on the bond of a contractor for the construction of a highway, brought by a bank claiming to be the assignee of claims for labor and material furnished, where the evidence showed an arrangement between plaintiff and the contractor whereby plaintiff was to honor the checks given by the contractor to laborers and materialmen, that the arrangement was carried out by the bank paying the checks or orders, which showed the purpose for which they were intended, that the contractors had no funds in the bank, but at intervals executed notes to the bank for amounts advanced by it, such bank was not an assignee so as to sue on the contractor's bond conditioned for the payment of the claims of laborers and materialmen, although it was further shown that the bank preserved such checks to be used in settlement with the contractor, and made no entry of their payment on its books.

Title Guaranty, etc., Co. v. State, ex rel., 268, 275 (4).

2. *Contractor's Bond.—Construction.*—The bond of a highway contractor, conditioned for the payment of all debts incurred in the prosecution of the work, including labor and materials furnished, was liable for an indebtedness due a bank which, pursuant to an arrangement with the contractor, honored the checks of the contractor issued for labor and material used in building the highway.

Title Guaranty, etc., Co. v. State, ex rel., 268, 280 (7).

3. *Contractor's Bonds.—Power of Board of Commissioners.*—While §7723 Burns 1908, Acts 1905 p. 521, §74, requiring the bond of a contractor for the construction of a highway to be conditioned for the payment of laborers and materialmen, did not require a condition for the payment of all debts incurred, the board of county commissioners had authority to accept a bond with such additional

HIGHWAYS—Continued.

requirement and holders of general claims against the contract, incurred in connection with the work, could sue on such bond.

Title Guaranty, etc., Co. v. State, ex rel., 268, 281 (8), 291 (8).

4. *Contractor's Bond.—Assignment of Claims.—Action.*—Where it appeared that claims for material and labor furnished in the construction of a highway were sold and transferred to plaintiff, and that in a transaction with the contractor that became connected with such transfer the contractor agreed, either with the laborers and materialmen or with plaintiff, to pay the claims out of the fund that would become due for building the road under the contract, such agreement by the contractor did not amount to an assignment creating a lien on such fund, and in no way restricted the rights of the plaintiff as an assignee of the claims of such materialmen and laborers to prosecute an action on the bond of the contractor, in view of the fact that it was conditioned for the payment of all debts incurred in the prosecution of the work, including labor and material furnished.

Title Guaranty, etc., Co. v. State, ex rel., 268, 273 (2).

5. *Improvement.—Rights of Materialmen.*—One furnishing gravel used in the improvement of highways is not entitled to preference in the allowance of his claim, independently of statute, as against one who furnished money for the contractor's payroll under an assignment by the contractor of the estimates and moneys to be paid for such improvement.

Tipton Realty, etc., Co. v. Kokomo Stone Co., 681, 689 (4).

6. *Improvements.—Assignment of Estimates and Money.—Rights of Materialmen.—Statutory Provisions.*—Where the contractor for the improvement of certain highways assigned all the estimates and moneys to be paid on said improvements to a firm who agreed to furnish money for the contractor's payroll, another firm which furnished gravel used in the construction was not entitled to have the funds retained for the payment of its claim under the act of March 4, 1911 (Acts 1911 p. 437, §§5901a, 5901b Burns 1914), passed shortly after such assignment, since §1 of said act provides for the retention of funds for subcontractors and laborers only, and while the provisions of §2 include materialmen, it applies only to contracts awarded after the passage of the act, and there is nothing to warrant the construction that the legislature intended the benefits of §1 to extend to materialmen.

Tipton Realty, etc., Co. v. Kokomo Stone Co., 681, 688 (3).

HUSBAND AND WIFE—

See RAILROADS 9.

1. *Dissolution of Marriage.—Agreements.—Validity.*—Husband and wife are not free to enter into agreements that tend to promote or facilitate the dissolution of marriage, since the State and society have such an interest that the law steps in and holds them to various obligations and liabilities. *Laufer v. Laufer*, 508, 513 (3).
2. *Inchoate Interest of Wife.—Acts of Husband.*—When a husband becomes seized of the title to lands in fee simple, the interest of his wife attaches as an incident to his seizing, and no act or conveyance by the husband without her joining therein in some manner can sever, divest or extinguish her interests.

Wachteller v. Johnson, 659, 670 (6).

3. *Inchoate Interest of Wife.—Foreclosure Sale.*—Where a husband acquired property subject to a judgment foreclosing a mortgage lien which he agreed to pay as a part of the purchase price, and the property was thereafter sold to satisfy such mortgage, the wife, by

HUSBAND AND WIFE—Continued.

virtue of her marital rights, could redeem her one-third interest after the death of her husband, she not being a party to the foreclosure proceeding.

Wachstetter v. Johnson, 659, 668 (5).

4. *Inchoate Interest of Wife.—Judicial Sale.—Statutes.*—Section 3052 Burns 1914, §2494 R. S. 1881, providing that where the inchoate interest of a married woman is not directed to be sold by the judgment or barred by virtue of the sale, it becomes absolute and vests in the wife in the same manner and to the same extent as upon the death of the husband, does not apply to sales of real estate upon judgments rendered prior to the taking effect of same, and prior to such statute a judicial sale vested the whole title in the purchaser subject to the inchoate right of the wife in one-third of the land sold in the event she survived her husband.

Wachstetter v. Johnson, 659, 666 (3).

5. *Inchoate Interest of Wife.—Redemption.—Payment of Mortgage.—Subrogation.*—Where a grantee, under a conveyance from a married man in which the wife did not join, paid a mortgage lien existing when grantor acquired the property, a conclusion of law, in an action by the children of grantor against the heirs of grantee to redeem their mother's inchoate interest, that grantee's heirs are entitled to be subrogated to the amount paid by grantee on the mortgage lien together with interest at six per cent. from date of grantor's death, etc., was not erroneous.

Wachstetter v. Johnson, 659, 678 (13).

6. *Inchoate Interest.—Bona Fide Purchaser.*—In view of the provisions of §3037 Burns 1914, §2499 R. S. 1881, that no act or conveyance, performed or executed by the husband without the assent of his wife evidenced by her acknowledgment thereof in the manner required by law, etc., shall extinguish her rights, the fact that a grantee paid a full and fair consideration and that he believed his grantor to be a single man, would not prevent the inchoate interest of grantor's wife from ripening on the death of her husband.

Wachstetter v. Johnson, 659, 672 (7).

7. *Inchoate Interest.—Judicial Sale.*—Where it appeared that grantee at the time of purchasing at a judicial sale and taking a sheriff's deed, already had on record a warranty deed to the realty in question from one who was at the time of its execution the owner in fee simple, and that the judgment lien upon which the sale was had, as well as all other liens, were to be paid by grantee as a part of the purchase price, the complete legal title was already in grantee at the time of the judicial sale and the title acquired at such sale merged into it, so that the inchoate interest of grantor's wife, who had not joined in the execution of the warranty deed, was not barred by such judicial sale, notwithstanding the lien for which the property was sold was in existence when grantor acquired his title, and upon the death of grantor such inchoate interest ripened into an estate subject to incumbrances that were paramount to it when grantor took title.

Wachstetter v. Johnson, 659, 674 (9).

8. *Mortgages.—Nonjoinder of Wife.—Extent of Lien.*—Where a husband takes title to real estate in his own name and executes a mortgage thereon to secure the payment of the purchase money, such mortgage is a valid lien upon the entire title, and the wife has no interest inchoate or otherwise as against the mortgage regardless of whether she joins in its execution; but as a general rule a mortgage by the husband alone on lands held by the entireties, to secure the payment of his individual debt, can not be established as a lien against such land or enforced against either him or his wife.

Simmons v. Parker, 403, 413 (5).

HUSBAND AND WIFE—Continued.

9. *Rights of Wife in Estate of Deceased Husband.—Statutes.—Construction.*—The statutory enactment in lieu of dower is liberally construed in favor of the widow and is regarded as analogous to dower. *Wachstetter v. Johnson*, 659, 668 (4).
10. *Rights of Wife in Estate of Deceased Husband.—Nature of Interest.*—A married woman is regarded as a purchaser for a valuable consideration of all the property which accrues to her by virtue of her marriage. *Wachstetter v. Johnson*, 659, 666 (2).
11. *Rights of Wife in Estate of Deceased Husband.—Statutory Provisions.*—The rights of a wife in the lands of her deceased husband are to be determined by the statutory provisions relating thereto, since tenancy by dower is abolished, and under §3014 Burns 1914, §2483 R. S. 1881, providing that one-third of the real estate of which the husband dies seized shall descend to the widow in fee simple, etc., she takes such interest in the lands he died seized of as an heir, while under §3029 Burns 1914, §2491 R. S. 1881, providing that a widow, except as excepted in the section above referred to, is entitled to one-third of all the real estate of which the husband may have been seized in fee simple at any time during the marriage and in the conveyance of which she may not have joined, and also of all lands in which her husband had an equitable interest at the time of his death, etc., she takes by virtue of her marital rights. *Wachstetter v. Johnson*, 659, 665 (1).
12. *Tenancy by Entireties.*—A tenant by the entireties owns merely the entire estate, and, if owned in fee, such an estate is not greater in quantity than any other estate in fee. *Simmons v. Parker*, 403, 416 (9).
13. *Wife's Action for Injuries.—Measure of Damages.—Instructions.*—In a married woman's action for personal injuries, an instruction informing the jury that the damages which she might recover should be limited to the injuries, if any, which she herself received "and the consequences naturally flowing therefrom", was not objectionable on the ground that the quoted phrase was susceptible of being understood as covering elements of damage for which she could not recover, when considered with the other instructions, and in view of the fact that the verdict was not such as to show that they jury was misled. *Chicago, etc., R. Co. v. Fisher*, 10, 18 (8).
14. *Wrongful Death of Wife.—Action for.—Benefit of Husband.—Statutes.*—Section 285 Burns 1914, Acts 1899 p. 405, authorizing actions for wrongful death to be maintained by the personal representative of the decedent recognizes two classes to whom the damages shall inure, the one consisting of the widow, or widower, as the case may be, and children, if any, and the other consisting of the next kin, so that an action for the benefit of a husband may be maintained thereunder for the death of the wife, although she left neither children nor next of kin surviving. *Chicago, etc., R. Co. v. Biddinger*, 419, 425 (3).
15. *Wrongful Death of Wife.—Action.—Right of Recovery.—Instructions.*—In an administrator's action for the death of his decedent, brought for the benefit of decedent's surviving husband, the defendant was not entitled to a peremptory instruction in its favor on the theory that while the complaint alleged that the husband was the sole heir of his deceased wife, the evidence showed that she left a father and mother who were heirs at law to one-fourth of the estate of over \$1,000, since the husband belonged to the first class of persons who under the statute would be entitled to damages, and where there are persons of this class the damages are awarded to them to the exclusion of the other class. *Chicago, etc., R. Co. v. Biddinger*, 419, 435 (15).

HUSBAND AND WIFE—Continued.

16. *Wrongful Death of Wife.—Damages.—Instructions.*—In an administrator's action for the wrongful death of his decedent, brought for the benefit of decedent's surviving husband, instructions stating that the damages, if any, suffered by the husband were pecuniary, and that the jury might take into consideration the expectancy of life of decedent, her habits of industry, thrift and economy, the nature and extent of services rendered for her husband, that the amount of her personal expenses should be deducted therefrom, and that no damages should be assessed for pain and suffering of decedent, nor for the wounded feelings of the husband, correctly stated the law so far as they went, and were unobjectionable in the absence of any request for instructions embodying features alleged to have been omitted.

Chicago, etc., R. Co. v. Biddinger, 419, 433 (11).

IMPLIED AUTHORITY—

The authority of a payee to fill blank spaces in a note may be implied from circumstances and from facts proved, see **BILLS AND NOTES** 6, 9.

IMPUTED NEGLIGENCE—

See **NEGLIGENCE** 10.

INCHOATE INTEREST—

Of wife, see **HUSBAND AND WIFE** 2-7.

"INCLUDING"—

See **WORDS AND PHRASES**.

INCOMPETENT EVIDENCE—

On a material matter is presumed to be harmful unless the record shows the contrary, see **APPEAL** 40.

INSTRUCTIONS—

See **TRIAL** 8-10.

INSURANCE—

See **CORPORATIONS** 2-5.

1. *Action on Life Policy.—Answer of Fraud.—Sufficiency.*—In an action on a life policy, and answer on the theory of fraud by the insured in falsely stating the nature of his occupation, was insufficient in the absence of any averment to show that the defendant elected to avoid and rescind the contract after discovery of the fraud by returning or tendering back the premiums paid.
Anchor Life Ins. Co. v. Meyer, 35, 40 (4).
2. *Action on Policy.—Complaint.—Negating Exceptions in Policy.*—Plaintiff in an action on a life insurance policy need not negative the exceptions contained therein, as they are matters of defense.
Anchor Life Ins. Co. v. Meyer, 35, 37 (2).
3. *Action on Policy.—Complaint.*—A complaint based upon a standard form of life insurance policy, alleging the execution of the policy and the death of the insured from a cause within its terms, and that plaintiff and the insured fully performed all the conditions of the policy to be performed by them, and disclosing nothing to the effect that the death resulted by reason of insured being engaged in any prohibited occupation, was sufficient as against demurrer.
Anchor Life Ins. Co. v. Meyer, 35, 37 (1).

INSURANCE—Continued.

4. *Action on Life Policy.—Defenses.—Death from Use of Explosives.*—Under a life policy exempting the company from liability if death ensued from the act of insured in making or using explosives, etc., the company could not avoid liability for the death of insured by the explosion of a steam boiler used in connection with the operation of a sawmill. *Anchor Life Ins. Co. v. Meyer*, 35, 39 (3).
5. *Construction of Policy.—Application.*—Where an application for insurance is by the terms of the policy made a part thereof, it and the policy are to be construed as one contract. *Anchor Life Ins. Co. v. Meyer*, 35, 40 (5).
6. *Forfeitures.*—Forfeitures of right to insurance are not favored in the law, and will be enforced only where there is the clearest evidence that such was the intention of the parties. *West v. National Casualty Co.*, 479, 489 (2).
7. *Forfeiture.—Estoppel.*—Where an insurance company, by its course of dealings with the insured and others known to the insured, has induced the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture. *West v. National Casualty Co.*, 479, 489 (3).
8. *Forfeiture.—Estoppel.—Time of Paying Premiums.*—Where an insurer by any agreement, either express or implied from its acts and conduct, causes the insured to honestly believe that it will receive the premiums after the time fixed in the policy and keep the policy alive, it is thereby estopped from asserting a forfeiture provided in the policy for failure to pay at the specified time, on account of a delay in payment induced by such agreement and the premiums paid and received in accord therewith. *West v. National Casualty Co.*, 479, 490 (4).
9. *Forfeiture.—Estoppel.—Power of Agent.—Extending Time of Paying Premiums.*—Under the rule that a principal is charged with any act or contract of the agent within the general scope of his apparent authority, the agent of an insurance company having authority to accept payment of premiums and issue renewal receipts, thereby in effect extending or renewing the policy for the period covered by the renewal receipt, necessarily has authority to extend the time of payment of such renewal premiums, notwithstanding a stipulation in the policy to the contrary, so as to estop the company from asserting a forfeiture grounded on a failure to pay at the time provided in the policy, induced by the acts and conduct of such agent. *West v. National Casualty Co.*, 479, 492 (5), 495 (5).
10. *Fire Insurance.—Alienation of Property.—Liability on Premium Note.*—Where the assured under a fire policy paid the first annual premium in cash and executed notes for succeeding years of the policy term, and prior to the expiration of the first year sold the property covered and tendered back the policy for cancellation, he was not liable on the premium notes; it appearing that the cash premium was more than the short rate for the time the policy had been in force, and that the policy by its terms became void on a transfer of the property. *Continental Ins. Co. v. Smith*, 401.
11. *Knowledge of Agent.*—The knowledge of an insurance agent acquired while acting for his company in connection with a matter in which he is authorized to act, will be imputed to the company. *West v. National Casualty Co.*, 479, 494 (7), 495 (7).
12. *Liability Insurance.—Contracts.—Construction.*—The contracts or policies of surety companies engaged in the business of providing indemnity against loss for a money consideration paid by the in-

INSURANCE—Continued.

sured, are to be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable ground to expect. *Evansville Ice, etc., Co. v. Fidelity, etc., Co.*, 194, 198 (1).

13. *Liability Insurance.—Exception in Policy.—Construction.*—Where the exception in a policy issued by defendant insuring plaintiff against liability for injuries to its employees, when properly construed, exempted the defendant from liability thereon where injury was suffered by any person in connection with the making of additions or repairs to or alterations in any building, structure or plant, plaintiff's claim for money expended for medical aid to an injured employe, and for defending an action brought by such employe, was not within the terms of the policy, in view of the fact that such employe was injured while unloading a coil from a car to be installed in an addition which plaintiff was constructing to its ice plant, though such employe was a general employe not directly engaged either in the construction of the addition or in the installation of the appliances therein.

Evansville Ice, etc., Co. v. Fidelity, etc., Co., 194, 199 (2).

14. *Life Insurance.—Industrial Policy.—Forfeiture.—Premiums.—Payment by Agent of Insurer.—Effect.*—Where the agent of insurer, on being advised by plaintiff that he was unable to pay the weekly premiums on an industrial policy on the life of his child agreed temporarily to pay the premiums for plaintiff, such agreement merely created an agency as between plaintiff and such agent and was not binding on the insurer; but to the extent that such agent in fact paid premiums, they must be deemed paid.

Public Savings Ins. Co. v. Manning, 239, 244 (2).

15. *Life Insurance.—Industrial Plan.—Forfeitures.*—In view of the nature of industrial insurance and the class of people with whom the company deals in issuing such policies and collecting the premiums thereon, courts are justified in seizing hold of and giving effect to slight circumstances in order to prevent a forfeiture, where the forfeiture, if enforced, must be based upon some provision inserted in the contract for the benefit of the insurer.

Public Savings Ins. Co. v. Manning, 239, 253 (7).

16. *Life Insurance.—Waiver of Provisions in Policy.—Acts of Agent.*—Although an industrial policy on plaintiff's child provided against waiver of any of its provisions except by indorsement signed by the president, vice president, secretary or medical director of the company, a verdict for plaintiff was not precluded even if the evidence were held to show a failure to keep the premiums paid as required by the policy, in view of evidence showing that after the time when the policy was alleged to have expired, defendant's superintendent of agents called at plaintiff's home to discuss the policy and assured plaintiff that the policy had not lapsed and that it was only necessary for plaintiff to resume payment of the premiums, that thereafter plaintiff paid a premium and was given credit therefor in a book provided by defendant for such purpose, and that plaintiff, though at the time entitled to have the policy reinstated, was not advised by such superintendent or by the agent to whom he subsequently paid the premium that such course was necessary, since under the evidence the acts of such superintendent and agent must be deemed a waiver of the provision against forfeiture.

Public Savings Ins. Co. v. Manning, 239, 246 (3), 248 (3), 249 (3).

17. *Life Insurance.—Action on Industrial Policy.—Premiums Paid by Agent of Insurer.—Evidence.—Sufficiency.*—Where an industrial policy provided that benefits should be paid if the insured died while premiums were not in arrears exceeding four weeks, and that no agent could alter or change the contract, evidence showing an

INSURANCE—Continued.

agreement for temporary payment of premiums by the agent of insurer on behalf of plaintiff, that subsequently the insurer's superintendent called at plaintiff's home and informed him that the policy was still in force and advised him to pay the premiums, that pursuant to such advice plaintiff saw the agent and told him he could resume payment, that such agent called the following Monday and collected one weekly premium on the policy and entered the payment in a book furnished by insurer to plaintiff for that purpose, together with testimony of the agent from which it appeared that he had personally paid plaintiff's premiums in an amount sufficient to extend the policy beyond the date of the death of plaintiff's child, on whose life it was issued, was sufficient to support a verdict for plaintiff as against the theory that the policy had lapsed.

Public Savings Ins. Co. v. Manning, 239, 241 (1), 245 (1).

18. *Provisions of Policy.—Waiver.*—The express provisions in a policy of insurance that no agent has authority to change the policy or waive any of its provisions, may be waived by an agent of the company acting within his actual or apparent authority.

West v. National Casualty Co., 479, 493 (6).

19. *Provisions in Policy.—Waiver.*—Restrictive provisions in a policy of insurance, being for the benefit of the company, may be waived by it; and, since oral contracts of insurance are as valid as if in writing, such provisions may be waived verbally.

Public Savings Ins. Co. v. Manning, 239, 249 (5).

20. *Provisions in Policy.—Waiver.*—Since a corporation can act only by agent, it follows that a provision in a policy of insurance limiting the power of agents, or providing how the contract may be modified, may be waived by an agent expressly authorized to that end, or by an agent whose authority may be implied from the nature of the agency, a course of dealing or the nature of the business transacted. *Public Savings Ins. Co. v. Manning*, 239, 249 (6).

21. *Renewal Premiums.—Condition of Receipt.—Jury Question.*—Whether insured's renewal premiums were received, and his insurance continued, under a clause of the policy providing for temporary suspension of liability if such premium was not paid at a specified time, or whether they were paid and received under an arrangement waiving strict compliance with the policy as to time of such payments, is a question for the jury; the evidence thereon not being undisputed. *West v. National Casualty Co.*, 479, 498 (9).

22. *Renewal Premiums.—Extending Time of Payment.—Injury Before Payment.*—The fact that payment for the monthly renewal premium was made after the insured was injured did not destroy his right to make it under an arrangement with the agent, pursuant to which he had for a long time been acting, that payments might be made at any time before the tenth of the month, especially in the absence of any evidence of collusion or fraud between them, or that he had before the injury determined that he would make no more payments. *West v. National Casualty Co.*, 479, 498 (8).

23. *Restrictive Provisions.—Enforcement.*—Restrictive provisions in a contract of insurance are not literally enforced by the courts regardless of the attending circumstances.

Public Savings Ins. Co. v. Manning, 239, 247 (4).

INTEREST—

Failure to demand, see SALES 2.

Rate of, see BILLS AND NOTES 7.

Recovery of, see SALES 1-3.

Recovery.—Unliquidated Claim.—Interest may be recovered on an unliquidated claim under some circumstances.

Kuhn v. Powell, 131, 134 (4).

INTERROGATORIES TO JURY—

See **APPEAL** 82, 89.

Submitting, see **APPEAL** 64.

INTERURBAN RAILROADS—

See **RAILROADS** 1.

JOINT SPECIFICATION—

Of error, see **NEW TRIAL** 1.

JUDGMENT—

On demurrer, see **APPEAL** 28.

On answer to interrogatories, see **RAILROADS** 12.

Motion for, notwithstanding verdict, see **APPEAL** 68.

Revival of, see **APPEAL** 27.

The pendency of a motion to modify, does not operate to extend the time for taking an appeal, see **APPEAL** 12.

The payment of a, or a part thereof by a judgment defendant does not necessarily estop him from prosecuting an appeal therefrom, see **APPEAL** 6.

The ruling of the trial court on an application to stay proceedings for nonpayment of the costs of a former suit is not a final, from which an appeal may be taken, see **APPEAL** 2.

Revival.—Execution.—Under §717 Burns 1914, §675 R. S. 1881, providing that after the lapse of ten years from the entry of judgment, or the issuing of an execution, an execution can be issued only upon leave of court, upon motion, upon ten days' personal notice to the adverse party, etc., it is not contemplated that the proceeding shall be commenced by pleading in the nature of a complaint, but simply by a motion to be heard by the court in a summary way.

Coffin v. Pfau, 384, 386 (1).

JUDICIAL SALE—

See **HUSBAND AND WIFE** 4, 7.

JURISDICTION—

Appellate, see **APPEAL** 1.

JURY—

See **QUESTIONS FOR JURY**.

Province of court and, see **CONTRACTS** 13.

Interrogatories to, calculated to have no other effect than to confuse and mystify the jury, should not be permitted, see **TRIAL** 2.

JUSTICES OF THE PEACE—

Action commenced before, see **PLEADING** 3, 4.

JUVENILE COURT—

The statute permits a less formal and technical procedure in the taking of appeals from the, than is customary in other proceedings, see **APPEAL** 1.

KNOWLEDGE—

Of agent, see **INSURANCE** 11.

Of infirmities, see **BILLS AND NOTES** 5, 19.

LACHES—

See FRAUD 3; QUIETING TITLE 2.

LANDLORD AND TENANT—

1. *Forcible Entry.—What Constitutes.—Force Required.*—While the act of a landlord and his new lessee, on the alleged termination of the lease and right to possession of an occupying sub-tenant, in entering the premises in the absence of the latter, by prying boards off a trap door in the floor of a cellar to which the landlord had access, did not in itself amount to a forcible entry as defined by §8083 Burns 1914, §5237 R. S. 1881, yet such method of entrance, coupled with the fact that it was for the purpose of obtaining possession as against one who was holding under a claim of right, and the further facts that they promptly proceeded to barricade the doors and placed on guard a special policeman bearing the indicia of authority, who protected the premises against reentry until arrested at the instance of the sub-tenant, who immediately instituted legal proceedings, constituted a forcible entry within the meaning of the statute.

Hammond Sav. etc., Co. v. Boney, 295, 306 (6).

2. *Recovery of Possession.—Process of Law.*—The rule that a landlord, entitled to immediate possession through expiration of the term, may take such possession by force and will incur no civil liability except for excessive force, has no application to cases where such possession is obtained in violation of the forcible entry and detainer statute; and an entrance under circumstances amounting to a forcible entry, though made in reliance on the provision of a lease entitling the landlord to enter, take possession and expel the occupant without in any way being a trespasser, created a liability under §8083 Burns 1914, §5237 R. S. 1881, defining forcible entry and detainer.

Hammond Sav., etc., Co. v. Boney, 295, 310 (7).

3. *Rights of Tenant.—Knowledge of Prior Lease.*—The occupant holding over after the expiration of his term and claiming some new right in the premises by virtue of an alleged oral understanding had with the owner after actual and constructive knowledge that the latter had leased to another, could not successfully maintain such right against the lessee.

Hammond Sav., etc., Co. v. Boney, 295, 299 (1).

LAST CLEAR CHANCE—

See RAILROADS 19, 20, 22, 24.

LEGISLATIVE INTENT—

See STATUTES.

LIABILITY INSURANCE—

See INSURANCE 12, 13.

LICENSES—

1. *Authority to Conduct Business.—Presumption and Burden of Proof.*—Where a statute fixes certain requirements as conditions precedent to the right to carry on a certain business, or to the performance of certain acts, and fixes a penalty for noncompliance therewith, the party who seeks to enforce a right dependent upon such law has the burden of showing compliance therewith and may not rely upon the presumption that the requirements of the law have been satisfied.

Bright Nat. Bank v. Hartman, 440, 448 (6).

LICENSES—Continued.

2. *Rights of Unlicensed Persons.—Contracts.*—Where a statute forbids the carrying on of any business without first procuring a license, paying a tax, inspection, registration, complying with prescribed tests, or the like, contracts relating thereto made by persons in carrying on such business are void, though the statute contains no express provision to that effect.

Bright Nat. Bank v. Hartman, 440, 447 (5).

LIENS—

Vendor's, see MORTGAGES 7; VENDOR AND PURCHASER 1-4.

Equitable Liens.—A mere agreement to pay out of a fund is not sufficient to create a specific equitable lien on the fund for the payment of the debt involved.

Title Guaranty, etc., Co. v. State, ex rel., 268, 273 (3).

LIFE INSURANCE—

See INSURANCE 1-5, 14-17.

LIQUIDATED DAMAGES—

See DAMAGES 5-10.

KNOWLEDGE—

Of infirmities, see BILLS AND NOTES 19.

MARRIAGE—

Dissolution of, see HUSBAND AND WIFE 1.

MASTER AND SERVANT—

See NEGLIGENCE 4.

1. *Employers' Liability Act.—Railroad Employes.*—The Employers' Liability Act of March 4, 1893 (§8017 Burns 1914, Acts 1893 p. 294), applies only to that class of railroad employes whose duties expose them to peculiar hazards incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby; hence an employe of a railroad company engaged to break coal at a dock, and who was injured in the course of his employment by the falling of the door of a standing dump coal car which was being unloaded, was not within the provisions of the act.

Toledo, etc., R. Co. v. Cowan, 375, 378 (1).

2. *Injuries to Railroad Employe.—Complaint.—Sufficiency.*—A complaint for injuries to an employe of a railroad company though claimed to state a cause of action under §8017 Burns 1914, Acts 1893 p. 294, is sufficient on demurrer if it states a cause of action either under the statute or at common law.

Toledo, etc., R. Co. v. Cowan, 375, 381 (2).

3. *Injuries to Servant.—Assumption of Risk.*—As a general rule under the common law, the servant assumes the risk of defects or dangers of which he has knowledge or of which he could have had knowledge by the exercise of ordinary care.

Toledo, etc., R. Co. v. Cowan, 375, 381 (5).

4. *Injuries to Servant.—Complaint.—Causal Connection.*—A complaint for injuries to a servant, to be good as a common-law action must show a causal connection between the negligence charged and the injury complained of.

Toledo, etc., R. Co. v. Cowan, 375, 381 (3).

5. *Injuries to Servant.—Complaint.—Employer's Liability Act.—Mine Servant.*—The Employer's Liability Act of 1911 (Acts 1911

MASTER AND SERVANT—Continued.

p. 145, §8020a Burns 1914), gives no right of action against an employer except for negligence, eliminates the doctrine of assumed risk where there is a violation of an ordinance or statute, or when it arises from obedience to orders or directions from the employer or any one the employe is bound to obey, or is based on known defects in the place of work, or which might have been known, or where the injury arises from dangers or hazards inherent or apparent in such place, and eliminates the defenses of negligence and contributory negligence resulting from obedience or conformity to an order or direction which the employe was bound to obey; and, since §8580 Burns 1914, Acts 1905 p. 65, §12, relating to the operation of coal mines, recognizes two ways of making such mines safe, a complaint for injuries to a mine employe whose duty it was to repair the mine in conformity to an order of the mine boss, which disclosed that the way selected by the boss was dangerous and known so to be, although a safer way could have been selected, and that while attempting to do the work in conformity to such order loose slate fell on such employe, etc., stated a cause of action under the Employer's Liability Act. *Vandalia Coal Co. v. Alsopp*, 649, 654 (1).

6. *Injuries to Servant.—Defective Handcar.—Verdict.—Evidence.*—In a railroad section hand's action for injuries from the defective condition of a handcar furnished for the transportation of employes, whereby he was thrown to the ground on the sudden stopping of the car, a verdict for plaintiff was supported by evidence showing that the defect was such as to cause the car to lurch forward only when the car was brought to a sudden stop, that the occasion of the accident was the first time during the plaintiff's employment that the car was brought to a sudden stop, that the defect was not open and obvious and had not been noticed by him before, and that the defect had been brought to the notice of the foreman by other employes who had noticed it a few days before the accident. *Vandalia R. Co. v. Parker*, 146, 151 (2).

7. *Injuries to Servant.—Defective Handcar.—Assumption of Risk.—Knowledge of Defects.—Complaint.*—In an action for injuries to a railroad section hand caused by defective condition of a handcar provided by the company for the transportation of its employes, the mere showing in the complaint that plaintiff had ridden upon the car some distance immediately preceding the accident, did not render the pleading objectionable, since in view of the fact that plaintiff had the right to rely on the presumption that defendant had performed its duty to furnish a safe car for his transportation and that he was not required to make an inspection of the car before using it, the court could not say as a matter of law that he assumed the risk, in the absence of averments showing that the defects were open and obvious, and that plaintiff had actual knowledge of the defect complained of.

Vandalia R. Co. v. Parker, 146, 150 (1).

8. *Injuries to Servant.—Fellow Servant.—Complaint.*—Under the common law, in a servant's action for personal injuries caused by the negligence of another in the employ of the common master, the complaint must show affirmatively that the negligent employe was not the fellow servant of plaintiff and it must appear that he was in the discharge of a duty which the master owed to plaintiff.

Toledo, etc., R. Co. v. Cowan, 375, 382 (6).

9. *Injuries to Servant.—Unsafe Appliances.—Complaint.—Knowledge of Defect.*—A complaint to enforce the master's common-law liability for injuries to a servant, and based on the master's neglect with respect to safe appliances, or a safe place to work, must aver

MASTER AND SERVANT—Continued.

knowledge, actual or constructive, on the part of the master and want of knowledge on the part of the injured servant.

Toledo, etc., R. Co. v. Cowan, 375, 381 (4).

10. *Injuries to Third Persons.—Liability.*—An employer is liable for injuries wilfully or carelessly inflicted by an employe while in the performance of his duties, whether the particular act complained of was authorized by the employer or not.

Mast v. Borneman & Sons, 325 (1).

11. *Injuries to Third Person.—Liability.*—An injury inflicted on plaintiff while in defendant's store to exchange a defective hammer for a good one, caused by the act of defendant's clerk in striking the hammer a heavy blow with a large hammer which caused a piece of steel to fly from the defective hammer and strike plaintiff's eye, can not be deemed a mere accidental injury, in view of the showing that plaintiff had pointed out the defect as being a condition of the steel that caused flakes of steel to slough when the hammer was in use, and that such defect was so obvious that no test was necessary, but was an act of negligence for which defendant was liable, since such clerk had cause to anticipate that as a result of his act a particle of steel might fly from such hammer and cause injury to one standing in close proximity.

Mast v. Borneman & Sons, 325 (3).

12. *Injuries to Third Persons.—Action.—Complaint.*—In an action against the proprietor of a store for injuries caused by the negligence of defendant's clerk, a complaint alleging that plaintiff purchased a hammer from defendant which was defective in that the metal was too soft and would slough and break off; that he returned the hammer and pointed out the defects to defendant's clerk who examined its condition and promised to give a good hammer in exchange for it; that, while plaintiff was waiting for the exchange to be made, the clerk carelessly and negligently struck the hammer a violent and heavy blow with a larger hammer, thereby causing a flake of steel from one of the hammers to slough off and fly into plaintiff's eye; that the hammer was so obviously defective that no test was necessary; and that such clerk knew or by the exercise of ordinary care should have known that the ordinary, probable and natural consequences of striking the two hammers together with force and violence would be to chip off or break flakes or particles of metal and set them violently in motion, was sufficient as against objection on demurrer to show that the flake of steel which caused the injury came from the defective hammer when struck by the testing hammer. *Mast v. Borneman & Sons*, 325 (2).

13. *Negligence of Servant.—Liability of Master.*—The master is responsible for the acts of his servant done in obedience to the express orders or directions of the master, or in the execution of the master's business within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done.

Premier Motor Mfg. Co. v. Tilford, 164, 169 (3).

MATERIALMEN—

See HIGHWAYS 5, 6.

MEANDER LINES—

See BOUNDARIES 1; WATERS AND WATERCOURSES 1, 2.

MEASURE OF DAMAGES—

See **HUSBAND AND WIFE** 13.

MEMORANDA—

The court on appeal may look beyond the memorandum of defects accompanying a demurrer for the purpose of sustaining the ruling of the trial court sustaining such demurrer, see **APPEAL** 73.

MISCONDUCT—

Of fellow passengers, see **CARRIERS** 6, 7.

MISJOINDER—

Of causes of action, see **ACTION**.

MISREPRESENTATION—

See **FRAUD** 6-8.

MONUMENTS—

Natural, see **BOUNDARIES** 2, 3.

MOOT QUESTIONS—

Will not be considered, see **APPEAL** 34.

MORTGAGES—

See **HUSBAND AND WIFE** 8.

1. *Assignment.—Notice of Infirmary.*—Where the attention of the assignee of a purported purchase money note and mortgage was specifically directed to the fact that the name of both husband and wife appeared in the body of the mortgage, which was signed by the husband alone, and he was informed that they held title by the entireties to the premises described, which fact was also disclosed by the deed record, and it appeared that he also knew that the wife has refused to sign the mortgage because of certain misrepresentations of the grantor, such assignee was charged with the duty of inquiry.
Simmons v. Parker, 403, 417 (12).
2. *Assignments.—Vendor's Lien.—Estoppel.*—While a mortgage lien will pass by assignment of the mortgage, and a vendor's lien, being a mere incident of the debt, will pass by assignment of a purchase money note, grantees who held by the entireties were not estopped from contesting the existence of a lien upon either theory as against the assignee of a mortgage and not purporting to be for an unpaid portion of the purchase price, and which were executed by one of the grantees without the other's knowledge and consent, and contrary to an express understanding between the grantor and grantees that no indebtedness whatever should arise against either of the grantees by reason of the conveyance, except upon the fulfillment of a certain condition which never materialized; and especially in view of the fact that such assignee was an assignee with notice.
Simmons v. Parker, 403, 417 (11).
3. *Delivery.—Validity.*—To constitute a valid delivery of a mortgage, the act must combine with an intent to that end.
Simmons v. Parker, 403, 412 (4).
4. *Delivery.—Evidence.*—Where there was evidence to show that at the time of effecting an exchange of real estate, there was an agreement by one of the parties to execute a mortgage on condition that subsequent investigation should prove that property received by

MORTGAGES—Continued.

him was as represented in the negotiations, and that thereafter, while the wife of such party was away investigating the property such party executed a note and mortgage and placed it in the hands of the other party for the purpose of procuring the signature of the mortgagor's wife in case the property investigation proved satisfactory, such delivery did not constitute a delivery of the mortgage, and the mortgagee could base no right thereon as against the mortgagor or his wife. *Simmons v. Parker*, 403, 412 (3).

5. *Foreclosure.—Deed.—Relation.*—Where there is a sale on a decree of foreclosure of a mortgage the deed to the purchaser relates back to the execution of the mortgage.

Wachstetter v. Johnson, 659, 674 (8).

6. *Nature and Effect.*—A mortgage is but a lien on land as security for a debt, and the legal title remains in the mortgagor subject to the lien of the mortgage. *Raub v. Lemon*, 59, 71 (3).

7. *Vendor's Lien.—Rights of Subsequent Grantee.*—Although the facts were sufficient to place a subsequent grantee on inquiry as to a supposed mortgage and vendor's lien against the property, he was not precluded from having his title quieted against one asserting such liens, even though he made no such inquiry, where inquiry if made would have disclosed the non-existence of the alleged liens.

Simmons v. Parker, 403, 418 (13).

MUNICIPAL CORPORATIONS—

1. *Contracts with Officers.—Secretary of Board of Health.*—A contract between a board of town trustees and the secretary of the town's board of health, employing the latter to care for smallpox patients during an emergency, was not within the letter of §2423 Burns 1914, Acts 1905 p. 584, §517, making it a criminal offense for a public officer to enter into contracts wherein the State, county, township, town or city, in which he exercises official jurisdiction is concerned. *Town of New Carlisle v. Tullar*, 230, 234 (3).

2. *Defective Streets.—Injury to Pedestrian.—Contributory Negligence.*—Though a pedestrian has knowledge of the dangerous or defective condition of a street, it is not negligence as a matter of law for him to use such street, unless the danger is so great as to preclude use by a person in the exercise of ordinary care.

Morrissey v. Cleveland, etc., R. Co., 90, 99 (6).

3. *Health Board.—Status of Secretary of Board.—Contract with Municipality.—Validity.*—Under §7605 Burns 1908, Acts 1891 p. 15, providing that "the trustees of each town * * * and the board of commissioners of each county shall constitute a board of health *ex officio* for each town and county, respectively" and authorizing the selection of a secretary who shall be the executive officer of the board and receive such salary as the board electing him may determine, such secretary was the one upon whom responsibility rested in determining when the necessity for action arose and the character and extent of means employed in preventing the spread of contagious diseases and caring for indigent patients, and such officer of a town board of health was an officer of the municipality for the purpose of discharging the duties devolving upon him, with power to incur indebtedness against the municipality in certain contingencies; hence a contract between a board of town trustees and the secretary of its board of health, whereby he was specially employed to care for smallpox patients was void as against public policy, and even if entered into prior to his appointment as secretary of the board of health, it could not, for reasons of public policy, be enforced as to services rendered while he was such health officer. *Town of New Carlisle v. Tullar*, 230, 234 (4), 236 (4).

NEGLIGENCE—

See RAILROADS 14, 16, 17.

Of servant, see MASTER AND SERVANT 13.

1. *Anticipating Consequences.*—While in every case of negligence it must appear that the injury described was caused by the negligent act of the party charged, it is not necessary that the precise consequences of the negligent act which did occur should have been foreseen by him. *Mast v. Borneman & Sons*, 325 (4).

2. *Automobiles.—Operation by Employe.—Liability of Owner.*—An automobile is not to be regarded in the same category with dangerous contrivances and agencies, and the owner is not liable to one injured in a collision therewith merely because of such ownership and the fact that the driver was in his employ, if the latter was riding for his own pleasure or profit and not upon the owner's business. *Premier Motor Mfg. Co. v. Tilford*, 164, 169 (4).

3. *Automobile Collision.—Complaint.—Averments.—Construction.—Motion to Make Specific.*—In an action against a corporation for injuries from collision with an automobile belonging to it, the charge in the complaint that defendant negligently operated the automobile, etc., though sufficient to make the pleading good as against demurrer, was the statement of a conclusion involving the further conclusions that the driver of the automobile was defendant's agent and that as such agent he was at the time acting within the scope of his employment, which rendered the complaint properly subject to a motion to make more specific in that respect. *Premier Motor Mfg. Co. v. Tilford*, 164, 168 (2).

4. *Automobile Collision.—Liability of Owner.—Master and Servant.—Evidence.*—In an action against an automobile manufacturer for injuries from collision with one of its automobiles, the evidence did not show the relation of master and servant between defendant and the driver of the automobile, even if it were conceded that it was shown that an agent of defendant, with authority to do so, had made an arrangement with such driver whereby the latter was to receive a commission on sales of automobiles made by him, where defendant had no right to manage, direct or control the time, manner or method of making such sales, since the right to in some way manage, direct or control the servant in his work is an essential element of the relation of master and servant; and, such relation not being shown, the refusal to direct a verdict for defendant was error. *Premier Motor Mfg. Co. v. Tilford*, 164, 170 (5).

5. *Collision on Street.—Verdict.—Answers to Interrogatories.*—In an action for injuries to plaintiff who was struck by an automobile while crossing a street, where the issues were such as to render admissible evidence that would wholly absolve plaintiff from the duty of looking, answers to interrogatories which did not show that she wholly failed to exercise care for her safety were not in conflict with a general verdict for plaintiff, in view of the presumptions plaintiff could indulge, even if they showed that she failed to look in the direction from which the automobile approached. *Cole Motor Car Co. v. Ludorff*, 119, 125 (7).

6. *Complaint.—Contributory Negligence.—Question for Jury.*—Where the facts alleged in the complaint are of such nature and character as to be reasonably subject to more than one inference as to whether the injured party was guilty of contributory negligence, the question is for the jury. *Chicago, etc., R. Co. v. Biddinger*, 419, 430 (8).

7. *Contributory Negligence.*—It is not every act of negligence on the part of an injured person that will defeat recovery, but such only as materially contributes to the injury.

Chicago, etc., R. Co. v. Biddinger, 419, 433 (12).

NEGLIGENCE—Continued.

8. *Driving Automobile.—Violation of Statute.—Instructions.*—Where the complaint charged negligence in the driving of an automobile east on the left side of the street and at the rate of twenty miles an hour in violation of the State law, so as to strike and injure plaintiff as he stepped from in front of a standing street car which was facing east, an instruction based on §10468 Burns 1908, Acts 1907 p. 558, advising the jury that the law provides that any person operating a motor vehicle upon meeting a person riding, leading or driving a horse, etc., upon any public highway, shall not operate it at a speed exceeding six miles an hour, and that a violation of the statute constituted negligence for which defendant was liable, if plaintiff was free from contributory negligence, was erroneous, since the provisions of the statute referred to had no application to the case.
Conder v. Griffith, 218, 221 (1).
9. *Driving Automobile.—Violation of Ordinance.—Evidence.—Instructions.—Jury Question.*—Under a charge of negligence in driving an automobile east on the left side of the street in violation of a city ordinance making it unlawful for vehicles to be driven over and along the left side of any street and requiring riders and drivers to "keep as nearly as practicable to the right side of the street", thereby causing such automobile to strike plaintiff as he stepped to the left side of the street from in front of a standing street car which was facing east, an instruction that the violation of such ordinance was negligence for which plaintiff could recover in the absence of contributory negligence, was erroneous in view of evidence showing that the street car was not at a regular stopping place and that the portion of the street to the right was blocked by a lumber wagon, since under such circumstances it was for the jury to determine whether it was practicable for defendant to pass on the right, and if not practicable his driving to the left was not actionable negligence.
Conder v. Griffith, 218, 222 (2).
10. *Imputed Negligence.—Negligence of Driver.*—The negligence of one driving an automobile while under the influence of intoxicating liquor, constituting a contributory cause of collision with a train, can not be imputed to his invited guest, unless his condition was known to the guest when he got into the machine or he remained therein after discovering such condition.
Pittsburgh, etc., R. Co. v. Kephert, 621, 625 (4).
11. *Pleading.—General Averment.—Sufficiency.*—A general allegation of negligence is sufficient to withstand a demurrer for want of facts, hence the facts constituting negligence need not be stated in detail.
Chicago, etc., R. Co. v. Fisher, 10, 17 (5).
12. *Pleading.—Proof.*—If several acts are charged as combining to bring about an injury, all of such acts must be proven in order to sustain a recovery.
Southern R. Co. v. Weidenbrenner, 314, 324 (11).
13. *Pleading.—Proof.*—An allegation that an act was negligently done or omitted is equivalent to an allegation that there was a failure to exercise ordinary care in discharge of the duty to plaintiff, and the allegation of an ultimate fact in reference to the negligent failure to perform a duty is sufficient to admit proof of every evidentiary fact necessary to show the want of due care.
Chicago, etc., R. Co. v. Fisher, 10, 16 (4).
14. *Use of Street.—Presumptions.*—In the absence of knowledge to the contrary, one lawfully using a public street has the right to presume that others using it in common with him will use ordinary care to avoid injuring him, and that persons driving thereon will do so in conformity to ordinances or laws regulating such use.
Cole Motor Car Co. v. Ludorff, 119, 124 (5).

NEGLIGENCE—Continued.

15. *Use of Street.—Presumptions.—Contributory Negligence.*—While the wrongful conduct of one who drives an automobile at an unlawful speed will not excuse a pedestrian upon the street from the exercise of care for his own safety, the absence of knowledge on his part of the unlawful conduct of such driver authorizes a consideration of the presumption of due care and conformity to law in determining whether under the particular circumstances the pedestrian exercised ordinary care for his own safety.

Cole Motor Car Co. v. Ludorff, 119, 124 (6).

16. *Violation of Statute or Ordinance.—Negligence Per Se.—Exceptions.*—As a general rule the violation of a statute or ordinance which is the proximate cause of an injury is negligence *per se*, but there may be facts and circumstances which will excuse a technical violation and render it improper for the court to declare as a matter of law that such violation constitutes actionable negligence.

Corder v. Griffith, 218, 223 (5).

“NET”—

See WORDS AND PHRASES 1.

NEWLY-DISCOVERED EVIDENCE—

Which is merely cumulative of the same kind and to the same point as that given at the trial will not be cause for a new trial, see NEW TRIAL.

NEW TRIAL—

Appellate Court ordering, see APPEAL 100.

Motions for, see APPEAL 8, 9.

The court on appeal will order a, if it appears that the ends of justice will thereby be best subserved, see APPEAL 100.

1. *Motion.—Joint Specification of Error.—Effect.*—An assignment in a motion for a new trial that “the court erred in giving instructions numbered one, two, three, four, five and six on its own motion”, is joint as to the instructions named, and all the instructions must be bad in order that it may be available on appeal.

Kuhn v. Powell, 131, 133 (1).

2. *Motion.—Time for Filing.*—Section 587 Burns 1914, Acts 1913 p. 848, requiring an application for new trial to be made within thirty days from the time when the verdict or decision is rendered is mandatory; hence where a motion for new trial was not filed until more than thirty days after the decision of the court was rendered, no question thereon could be presented on appeal.

Acme White Lead, etc., Works v. Indiana Wagon Co., 644.

3. *Newly Discovered Evidence.—Cumulative Evidence.*—A new trial will not be granted for newly discovered evidence which is merely cumulative, of the same kind and to the same point as that given at the trial.

Kirk v. Trabue, 466, 467 (2).

NOMINAL DAMAGES—

Even though plaintiff is entitled to, a failure to assess such damages, is not ground for reversal, see DAMAGES 3.

NON EST FACTUM—

Plea of, see BILLS AND NOTES 16.

NOTICE—

See **BANKS AND BANKING** 1.

Defective, waived, see **DEPOSITIONS**.

The mere endorsement of a note without recourse is not of itself sufficient to put the purchaser on inquiry, see **BILLS AND NOTES** 1.

The mere fact that the endorsee of a note objected to endorsement without recourse until he learned that the maker was perfectly solvent does not show that he had constructive, of a defect in the indorser's title, see **BILLS AND NOTES** 11.

NUISANCE—

See **RAILROADS** 5.

NUNC PRO TUNC—

Sufficient memorandum to authorize a correction of the record, see **COURTS** 3, 4.

OFFICERS—

Authority of the, of the State to sell swamp lands, see **PUBLIC LANDS** 5.

Contracts.—Validity.—Public Policy.—A contract entered into by a public officer, the execution of which may make it possible for his personal interests to become antagonistic to his faithful discharge of public duty, is void as being against public policy.

Town of New Carlisle v. Tullar, 230, 236 (5).

“OR”—

See **WORDS AND PHRASES**.

ORDINANCES—

Violating, see **NEGLIGENCE** 9, 16; **RAILROADS** 17.

PAROL EVIDENCE—

See **EVIDENCE** 2.

Admissibility of, see **CONTRACTS** 3, 8, 9, 14.

To explain written order, see **EVIDENCE** 6.

PARTIES—

See **BONDS** 1; **FRAUD** 9.

Misjoinder of cause of action as to, see **ACTION**.

Settlement between, without the knowledge of plaintiff's attorneys was constructive fraud, see **ATTORNEY AND CLIENT** 1, 2.

PARTITION—

1. *Attorneys' Fees.*—In a partition proceeding in which both sides are represented by attorneys, the trial court may in its discretion deny the request of plaintiff to allow fees to be paid to his attorney as a part of the costs of the suit. *Burger v. Schnaus*, 614, 619 (5).

2. *Report of Commissioners.—Description.*—On appeal from a judgment confirming the report of commissioners in partition, appellee's objection that the court made the description more definite than that contained in the report is not tenable, where the matter pointed out goes only to details and in no sense changes the meaning of the report. *Burger v. Schnaus*, 614, 618 (4).

3. *Report of Commissioners.—Review.*—Objection of plaintiff in partition that the commissioners considered only eighty acres while

PARTITION—Continued.

the tract actually contained 82.4 acres, was unavailable, where it was apparent not only from the original report considered in connection with the order of the trial court, but from the subsequent report as well, that the commissioners considered twenty-four acres set off to plaintiff as two-sevenths in value of the whole being exactly the interest he claimed by the allegations of his complaint.

Burger v. Schnaus, 614, 617 (3).

"PARTY"—

See WORDS AND PHRASES.

PASSENGERS—

Carriage of, see CARRIERS 5-7.

PATENTS—

See PUBLIC LANDS 1, 2.

PAYMENT—

See BANKS AND BANKING.

Of mortgages, see HUSBAND AND WIFE 5.

Stay of subsequent action until, of costs, see COSTS 1-4.

Of a judgment or a part thereof by a judgment defendant does not necessarily estop him from prosecuting an appeal therefrom, see APPEAL 6.

PENALTIES—

See DAMAGES 7-10.

PEREMPTORY INSTRUCTIONS—

See TRIAL 7, 9.

PERSONAL INJURIES—

See RELEASE; RAILROADS 30, 31.

PERSONS—

Injuries to, on premises, see RAILROADS 25, 26.

Injuries to, on tracks, see RAILROADS 22-24.

PLEADING.

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|--------------------------------|---------------------------|
| I. FORM AND ALLEGATIONS, 1, 2. | IV. DEMURRER, 16, 17. |
| II. COMPLAINT, 3-14. | V. AMENDED PLEADINGS, 18. |
| III. ANSWER, 15. | VI. MOTIONS. |

See EJECTMENT 1, 2; SALES 2.

Instruction applicable to, see RAILROADS 18.

Of general allegation of negligence is sufficient, see NEGLIGENCE 11.

Amendment of at the conclusion of the evidence, see FRAUD 10.

I. FORM AND ALLEGATIONS.

1. *Construction.—Conclusions.—Statutory Provisions.*—Section 343a Burns 1914, Acts 1913 p. 850, does not require every conclusion stated in a pleading to be considered and treated as an allegation of the facts necessary to sustain such conclusion, but its application is expressly limited to such conclusions as are necessary to the suf-

PLEADING—Continued.

ficiency of the pleading, and, aside from conclusions of the latter class, all statements in the pleading not necessary to its sufficiency may be disregarded.

Premier Motor Mfg. Co. v. Tilford, 164, 167 (1).

2. *Proof.—Variance.*—Where the averments of the complaint in an action for fraud in the sale of certain corporate stock were such that evidence of either a written or verbal sale was admissible, there was no variance upon proof that the transaction was in writing.
Voorhees v. Cragun, 690, 703 (12).

II. COMPLAINT.

See BONDS 1; CARRIERS 7; CONTRACTS 3; DAMAGES 2; DEATH 2; EXECUTORS AND ADMINISTRATORS 5; INSURANCE 3; MASTER AND SERVANT 2, 4, 5, 7-9, 12; NEGLIGENCE 3, 6; RAILROADS 4, 6, 26, 31.

Supplemental, see APPEAL 91.

Demurrer to supplemental, see APPEAL 21.

For damages for breach of contract, see DAMAGES 1, 11.

An assignment of error challenging the sufficiency of a, is unavailable, see APPEAL 23.

Where the predominating theory of a, is uncertain, the court on appeal will follow the theory adopted in the trial court, see APPEAL 65.

Plaintiff in an action on a life insurance policy need not negative the exceptions contained therein, as they are matters of defense, see INSURANCE 2.

3. *Counterclaim.—Sufficiency.—Action Commenced Before Justice of the Peace.*—In an action originating before a justice of the peace a complaint, or counterclaim will be sufficient if it informs the adverse party of the nature of the cause of action he is called upon to meet and is sufficiently explicit to bar another action for the same cause if judgment is rendered thereon.

Bump v. McGrannahan, 136, 140 (2).

4. *Counterclaim.—Sufficiency.—Action Commenced Before Justice of the Peace.*—In an action commenced before a justice of the peace, a complaint setting forth that plaintiffs were architects who had rendered services for defendant at his special instance and request in supervising the construction of a building, which were of a specified value, and that the amount claimed was due and unpaid, and a paragraph of counterclaim by defendant alleging that the services were pursuant to an oral contract by which plaintiffs were to compel the contractors to construct the building according to plans and specifications, that defendant was at all times ready to perform, but plaintiffs failed to turn the building over to defendant fully completed and at the price stated in the specifications and caused contractors to be paid in full, all in violation of their agreement, that it would require the expenditure of \$400 to complete the building according to plans and specifications, and that the contractors were paid by defendant at the direction of plaintiffs without knowledge on his part that the building had not been completed, whereby defendant was damaged in the sum of \$300, were each sufficient to withstand a demurrer for want of facts.

Bump v. McGrannahan, 136, 138 (1), 140 (1).

5. *Demurrer.*—Where the facts stated in a complaint are sufficient to entitle plaintiff to any substantial relief it is not subject to demurrer.
Eikenberry v. Thorn, 468, 478 (9).

PLEADING—Continued.

6. *Inconsistent Causes.—Tort and Contract.*—A complaint seeking recovery *ex contractu* is inconsistent in theory with a recovery *ex delicto*.
Miami County Bank v. State, ex rel., 628, 632 (2).
7. *Inconsistent Causes.—Tort and Contract.*—Where a paragraph of complaint was on the theory of an action to recover on a guardian's bond, it was insufficient as against a codefendant who was not a party to the bond, though it contained averments sounding in tort that might have been sufficient to show a liability based on alleged wrong in dealing with the trust funds.
Miami County Bank v. State, ex rel., 628, 632 (1).
8. *Initial Attack on Appeal.*—The sufficiency of a complaint for want of facts can not be assailed for the first time on appeal.
Chicago, etc., R. Co. v. Biddinger, 419, 424 (1).
9. *Sufficiency.*—A complaint will be sufficient to withstand a demurrer for insufficient facts if the facts averred entitle the plaintiff to any relief upon the theory of such pleading.
Miami County Bank v. State, ex rel., 628, 632 (4).
10. *Theory.*—When the theory of a complaint is clearly outlined, it must be sufficient on that theory when tested by demurrer.
Pittsburgh, etc., R. Co. v. Lamm, 389, 395 (4).
11. *Theory of Action.—Inconsistency.*—A complaint must proceed upon some definite theory and be good on that theory or it will be held insufficient when duly challenged.
Miami County Bank v. State, ex rel., 628, 632 (3).
12. *Theory of Action.—Inconsistent Causes.—Tort and Contract.*—A complaint which adopts some general theory may aver several facts which, independent of other averments, show a liability, and the plaintiff may recover by proof of so much of his complaint as shows a liability on the general theory of his pleading, but a pleading can not be held good on two or more inconsistent and contradictory theories. *Miami County Bank v. State, ex rel.*, 628, 632 (5).
13. *Waiver of Defects.*—The sufficiency of a complaint is waived by failing to demur thereto.
Voorhees v. Cragun, 690, 703 (11).
14. *Waiver of Defects.*—Where a complaint is insufficient, the defect must be presented by demurrer, or by answer if not apparent on the face of the pleading, and is waived if not thus presented.
Pritchard v. Mines, 203, 208 (4).

III. ANSWER.

See **BILLS AND NOTES 5.**

Of fraud, see **INSURANCE 1.**

Of *non est factum*, see **BILLS AND NOTES 16.**

Alleging parol contract, see **CONTRACT 3.**

Refusal to strike out, not error, see **APPEAL 74.**

15. *Sufficiency.*—A paragraph of answer to be good as against demurrer for want of facts must fully answer the complaint or so much of it as it purports to answer.

Craig v. Norwood, 104, 114 (13).

IV. DEMURRER.

See **APPEAL 91.**

Ruling on, see **APPEAL 69-73, 90.**

To complaint, see **APPEAL 66, 67.**

To supplemental complaint, see **APPEAL 21.**

PLEADING—Continued.

16. *Demurrer to Complaint.—Facts Admitted.*—Facts well pleaded in a complaint are to be taken as admitted against a demurrer.
Chicago, etc., R. Co. v. Biddinger, 419, 430 (7).
17. *Memorandum.*—A demurrer to an answer, unaccompanied by a memorandum of defects, raises no question.
Wenger v. Clay Tp., 640, 641 (1).

V. AMENDED PLEADINGS.

18. *Amendment Pending Trial.—Discretion of Court.*—Under a rule of the circuit court forbidding the filing of amendments without affidavit showing sufficient cause for not filing same before the issues were closed, and providing for the suspension of such rule when in the court's opinion the ends of justice would thereby be promoted, the court's action in permitting the amendment of the complaint immediately before trial so as to allege that the decedent at the time of his death was a brick mason by trade, earning five dollars a day, was not an abuse of the court's discretion, in view of defendant's right to have asked a continuance if necessary to its defense.
Cleveland, etc., R. Co. v. Cloud, 256, 260 (1).

VI. MOTIONS.

To suppress depositions should be made before entering on the trial, see **TRIAL** 1.

PRECIPE—

Sufficiency of, see **APPEAL** 15, 17, 19.

A written, is not required where a complete transcript is desired, see **APPEAL** 18.

PREMISES—

Injuries to persons on, see **RAILROADS** 25, 26.

PREMIUMS—

Extending time of paying, see **INSURANCE** 8, 9.

Paid by agent of insurer, see **INSURANCE** 14.

PRINCIPAL AND SURETY—

Contract.—Construction.—A surety for profit is not a favorite of the law, and is deemed an insurer rather than a surety, so that the contract of a surety for profit will be construed most favorably to the person intended to be protected thereby.

Title Guaranty, etc., Co. v. State, ex rel., 268, 280 (6).

PRESUMPTION—

See **LICENSES** 1; **RAILROADS** 12; **TRIAL** 4.

As to use of streets, see **NEGLIGENCE** 14, 15.

In favor of general verdict, see **APPEAL** 80.

There is no legal presumption that a railroad bridge was skillfully and carefully repaired, and that the company did nothing unlawful but such questions are matters of proof, see **EVIDENCE** 5.

"POSTPONEMENT OF ESTATES"—

See **WORDS AND PHRASES**.

POWERS—

Of administrators, see **EXECUTORS AND ADMINISTRATORS** 4.

PROOF—

See **PLEADING** 2.

If several acts are charged as combining to bring about an injury, all of such acts must be proven in order to sustain a recovery, see **NEGLIGENCE** 12, 13.

PUBLIC LANDS—

1. *Patents.—Construction.*—In interpreting a patent all contained in the patent must be considered, and the identity of the land ascertained by reasonable construction thereof, rejecting if necessary any erroneous call, and especially is this true where the survey was not actually run on the ground.

State v. Tuesburg Land Co., 555, 597 (14), 604 (14), 607 (14).

2. *Patents.—Construction.*—A patent usually conveys only land which has been surveyed, though in the case of patents issued under the Federal Swamp Land Act, where the land surveyed consists of fractional subdivisions or lots abutting unsurveyed submerged lands or marsh, the rule seems to be that the question of whether title to the unsurveyed territory passed from the United States by virtue of a patent of the surveyed land is dependent on the law of the State where the land is located.

State v. Tuesburg Land Co., 555, 583 (6).

3. *Surveys.—Construction.*—Under the second section of the Act of Congress of 1796, providing that navigable rivers shall not be included in public surveys, though the question whether a given river is to be included in a survey is within the discretion of the surveyor, his decision is not conclusive.

State v. Tuesburg Land Co., 555, 588 (9).

4. *Swamp Lands.—Acquisition of Title by State.*—A patent or at least a selection of land surveyed and the approval of such selection by the Secretary of the Interior, is a necessary prerequisite to the State's acquisition of title to lands under the Federal Swamp Land Act.

State v. Tuesburg Land Co., 555, 582 (5).

5. *Swamp Lands.—Sale by State.—Authority of Officers.*—The officers of the State authorized to act for the State in the sale of its swamp lands, were as effectively bound and limited in their authority by the act of the legislature, as an agent of an individual would be, acting under the same express authority in writing, and persons purchasing through the agents of the State were charged with knowledge of the authority under which such agents acted.

State v. Tuesburg Land Co., 555, 606 (16).

6. *Swamp Lands.—Title of State.*—Title by the State to reclaimed lands without the meander lines described in the patent of the United States conveying swamp lands to the State, can not be supported on the theory that if marsh lands or non-navigable waters are included within the meander line of a government survey on which fractional lots abut, such marsh land or water inside the meander line will be considered to have been surveyed and the lines of the survey extended or protracted across the meandered territory so as to embrace a full subdivision so partially surveyed, and that hence a patentee of the government of such subdivisions or lots takes of the unsurveyed territory an amount sufficient to complete his subdivision. *State v. Tuesburg Land Co.*, 555, 576 (3).

7. *Swamp Lands.—Title of State.—Extent.*—In view of the language of the Federal Swamp Land Act of 1850, and of the patents issued

PUBLIC LANDS—Continued.

thereunder by the United States to the State, as well as of the plat describing the sections as abutting on a meander line purporting to be that of the Kankakee, a non-navigable river, rather than a boundary line between surveyed land and unsurveyed submerged territory, all of which evidences the intention of the federal government to cede all the unsold swamp land in the State, the State acquired title to such unsurveyed submerged territory either by virtue of such patents, or under the doctrine of riparian ownership; the method of acquisition being dependent upon whether submerged land was considered as swamp land or as a portion of Kankakee river. *State v. Tuesburg Land Co.*, 555, 588 (10).

8. *Swamp Lands.—State Patents.—Scope of Conveyances.*—Though the State acquired title to unsurveyed territory or marsh along the Kankakee River from the United States, it did not, in conveying to individuals under patents describing the land as described in the plats and patents of the United States, part with title to such submerged land, since such grants were made pursuant to the State Swamp Land Act of 1852 (1 Rev. Stat. 1876 p. 952), providing for the platting of swamp lands and their sale at a stipulated sum per acre, and that the proceeds were to be used in paying for the sale of the lands, etc., and the grants, being statutory, are to be construed in view of the purposes and intention disclosed by such act. *State v. Tuesburg Land Co.*, 555, 592 (11), 594 (11), 597 (11), 604 (11), 607 (11).
9. *Title to Public Lands.*—The question of whether the title to lands belonging to the United States has passed from the government must be determined by the laws of the United States. *State v. Tuesburg Land Co.*, 555, 575 (2).

PUBLIC POLICY—

Contracts void as being against, see OFFICERS.

QUESTIONS FOR JURY—

SEE INSURANCE 21; NEGLIGENCE 6, 9; RAILROADS 10.

QUIETING TITLE—

1. *Action.—Burden of Proof.*—The plaintiff in an action to quiet title has the burden to prove that it had title when the action was commenced and such burden is not discharged by proof that defendant has no title. *State v. Tuesburg Land Co.*, 555, 574 (1).
2. *Laches.—Findings.—Review.*—In a suit for possession and to quiet title to certain real estate conveyed by plaintiffs' ancestor to defendant city for a market place, upon condition that on ceasing to use the same for a market place title should revert to the grantor, plaintiffs were guilty of such laches as to preclude a reversal of the judgment of the trial court for defendant, where the special finding disclosed that during the lifetime of the original grantor the use of the property for a market place was abandoned, that the city continued to assert title, and that thereafter during a period of thirty-nine years, the property was used and occupied as a street, while public and private rights resulting from such use had intervened to such extent that a reversal would result in hardship, litigation and needless expense. *Gasaway v. City of Lafayette*, 178.

RAILROADS—

Bridges of, see WATERS AND WATERCOURSES 5, 6.

Employees of, see MASTER AND SERVANT 1.

RAILROADS—Continued.

1. *Animals on Tracks.—Liability for Injury.—Statutory Provisions.*
—Interurban Railroads.—Sections 5436-5443 Burns 1914, Acts 1863 p. 25, Acts 1877 [s. s.] p. 61, relating to the liability of railroads for the killing of stock on their tracks, and §§5447-5450 Burns 1914, Acts 1885 p. 224, relating to the fencing of railroads, have no application to interurban railroads, and all legislation having application to interurban railroads expressly so states.
Union Traction Co. v. Thompson, 183, 185 (3).
2. *Change of Grade.—Liability to Abutting Owners.*—Generally a railroad company may improve, repair, or change its road bed, or raise or lower its grade, without liability to respond in damages to an abutting property owner, unless the change is made in a careless and negligent manner.
Pittsburgh, etc., R. Co. v. Lamm, 389, 393 (3).
3. *Change of Grade.—Liability for Damages.*—Consequential, incidental and unavoidable annoyances, not the result of negligent or careless operation of a railroad, do not constitute an actionable nuisance, nor does increased inconvenience from noise, smoke and cinders, caused by the raising of a railroad grade, not due to improper construction or negligent operation, afford any ground for recovery.
Pittsburgh, etc., R. Co. v. Lamm, 389, 397 (7).
4. *Change of Grade.—Damages from Negligent Work.—Complaint.*—Where the complaint, in an action for damages to plaintiff's property by the raising of defendant's rail road grade, alleged among other elements, that defendant built its embankment so that clay would wash therefrom onto the lawn of plaintiff, such allegation being so pleaded as to entitle plaintiff to recover therefor, and damages for such element being part of relief demanded, rendered the complaint good as against demurrer for want of facts.
Pittsburgh, etc., R. Co. v. Lamm, 389, 396 (6).
5. *Construction.—Nuisance.—Damages.*—Where the nuisance for the construction of a railroad embankment, whereby clay is washed upon an abutting lawn, has been abated, the measure of damages is the diminution of the rental value of the property during the time the nuisance existed.
Pittsburgh, etc., R. Co. v. Lamm, 389, 400 (11).
6. *Crossing Accidents.—Complaint.—Sufficiency.*—A complaint to recover for the wrongful death of one who was hit by a train at a crossing, alleging that decedent and her husband were traveling in a buggy toward the railroad to pass over the crossing, that the husband was driving, "and while he was so driving and as plaintiff's intestate approached and entered near to said railroad crossing they proceeded carefully and exercised all due care and caution to see or hear any train or engine or locomotive that might be approaching said crossing", was sufficient as against the theory that the statutory duty to sound the whistle and ring the bell applies only as to travelers on public highways actually crossing, or who had crossed, or who were about to cross.
Chicago, etc., R. Co. v. Biddinger, 419, 427 (5).
7. *Crossing Accidents.—Contributory Negligence.*—One who looks for an approaching train before attempting to cross the tracks can not be said to be guilty of negligence for not looking in the right direction at the precise place and time when and where looking would have been of the most advantage.
Baker v. Baltimore, etc., R. Co., 454, 460 (4).
8. *Crossing Accidents.—Contributory Negligence.—Right to Assume Obedience to Law.*—A traveler about to pass over a railroad cross-

RAILROADS—Continued.

ing has the right, within reasonable limits, to assume that the railroad company will signal the approach of its train to the crossing as required by statute, and that it will obey the provisions of an ordinance limiting the speed of trains.

Baker v. Baltimore, etc., R. Co., 454, 462 (6).

9. *Crossing Accidents.—Contributory Negligence.—Husband and Wife.*—In an administrator's action for the wrongful death of a married woman, who, while riding with her husband, was struck by defendant's train at a highway crossing, it was not necessary for plaintiff to allege or prove that the occupants of the buggy were free from contributory negligence, and even though it may have appeared from the complaint that decedent's husband, who was driving, was guilty of negligence, such negligence could not be imputed to decedent. *Chicago, etc., R. Co. v. Biddinger, 419, 428 (6).*
10. *Crossing Accidents.—Contributory Negligence.—Jury Question.*—In an action for injuries at a railroad crossing, plaintiff's testimony that he and the driver of an automobile in which he was riding approached the crossing and stopped on signal from the crossing flagman to permit a train to pass from the west, that after the train had passed the flagman signalled them to proceed and they were struck by a train from the east, which plaintiff could not see until upon the crossing, though he had looked both ways, etc., was sufficient to make the question of contributory negligence one of fact for the jury. *Pittsburgh, etc., R. Co. v. Kephert, 621, 624 (3), 625 (3).*
11. *Crossing Accidents.—Contributory Negligence.—Evidence.—Review.*—The objection that decedent and her husband had encased themselves in a top buggy with the top up and side curtains on, so that it was impossible for them to see, except directly in front of them, and then proceeded to drive toward a dangerous crossing without stopping, and only looked at a point about one hundred feet south of the crossing, etc., was not available in view of evidence and answers by the jury to interrogatories showing that decedent and her husband looked and listened as they approached the crossing from a point where they had a view of the track for about three hundred feet, and that if defendant company had obeyed the statutory provisions as to signals and the provisions of an ordinance regulating the speed of trains, decedent and her husband would have had time to have crossed the track in safety after having looked and listened. *Chicago, etc., R. Co. v. Biddinger, 419, 436 (16).*
12. *Crossing Accidents.—Contributory Negligence.—Judgment on Answers to Interrogatories.—Review.—Presumptions.*—In an action against a railroad company for the death of plaintiff's decedent at a crossing, where the railroad company's negligence may have been responsible for the perilous situation of decedent and a confused condition of her mind resulting therefrom, the court on appeal, in reviewing the action of the trial court in sustaining a motion for judgment for defendant on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff, must presume in favor of the general verdict that such confused condition of mind did exist and that defendant's negligence was responsible therefor, in the absence of a finding of the jury to the contrary, and hence decedent should not be charged with contributory negligence for lack of prompt and intelligent action resulting from such condition of mind. *Baker v. Baltimore, etc., R. Co., 454, 463 (7).*
13. *Crossing Accidents.—Duty to Look for Trains.*—While it is the duty of a person on approaching a railroad crossing to look in both directions for an approaching train, where the general verdict war-

RAILROADS—Continued.

ranted the assumption that at least during part of the time in which plaintiff's decedent was traveling from a point fifty feet south of the track to such track, she was looking toward the east for an approaching train, it can not be said as a matter of law that she was negligent for looking in such direction rather than in the direction from which the belated train which struck her was approaching. *Baker v. Baltimore, etc., R. Co., 454, 461 (5).*

14. *Crossing Accidents.—Failure to Signal Approach to Crossing.—Negligence.—Instructions.*—An instruction that the failure of defendant railroad company to comply with the statute in reference to sounding the whistle and ringing the bell on approaching highway crossing would amount to negligence, was not erroneous. *Chicago, etc., R. Co., v. Biddinger, 419 (13).*

15. *Crossing Accidents.—Verdict.—Answers to Interrogatories.*—Where the general verdict amounted to a finding that defendant railroad company had violated the statute with respect to the sounding of the whistle and ringing of the bell on the approach of its train to the crossing, as well as an ordinance regulating the speed of trains, and that decedent was not guilty of negligence materially contributing to her death, answers by the jury to interrogatories from which it appeared that the train was running at forty miles per hour, that decedent was well acquainted with the crossing, that the view of the crossing was obstructed at certain distances, etc., were not in irreconcilable conflict with the general verdict. *Chicago, etc., R. Co. v. Biddinger, 419, 431 (9).*

16. *Crossing Accidents.—Negligence.—Question of Law.*—In an action for the death of plaintiff's decedent at a railroad crossing, where it appeared, in view of assumption warranted, that if decedent had looked west three and a half seconds before her injury and when at a point fifty feet from the track, she would have seen no train approaching, and that if her attention had then immediately been directed toward the east for only two or three seconds while she continued her approach to the crossing, she would in all probability have been on the track within such time, and the approaching train could have been so close that escape was impossible, or at least so near that no appreciable time would have remained to her in which to determine and take intelligent action in view of her present and imminent peril, the question of negligence in decedent could not be determined as a matter of law, so as to sustain a judgment on the jury's answers to interrogatories notwithstanding the general verdict for plaintiff.

Baker v. Baltimore, etc., R. Co., 454, 464 (8).

17. *Crossing Accidents.—Violation of City Ordinance.—Negligence.—Instructions.—Review.*—While it is generally the duty of the court to say as a matter of law that a city ordinance is or is not in force, an instruction that if the jury found that there was an ordinance in force which limited the speed of trains, the violation thereof would be negligence, was not ground for reversal in view of interrogatories and instructions submitted by appellant from which it appeared that the error was invited.

Chicago, etc., R. Co. v. Biddinger, 419, 434 (14).

18. *Crossing Accident.—Instructions.—Application to Pleading and Issues.*—In an action for the death of plaintiff's decedent in a crossing accident, grounded on the theory that defendant's fireman and engineer negligently failed to see decedent approaching the crossing, and also that, seeing him, they negligently failed to check the engine in time to avoid the accident, where defendant offered evidence on contributory negligence, and the court gave

RAILROADS—Continued.

instructions at defendant's request on that theory, other instructions given were unobjectionable and were applicable to the evidence and theory of the case, which in effect merely informed the jury that it was defendant's duty to keep a lookout for persons attempting to use the crossing, and that if decedent was in a position of danger or appeared to be, and if defendant's employes in charge of the engine as it approached the crossing knew the conditions, it immediately became their duty to use ordinary care to avoid a collision, and that if by the exercise of reasonable care they could have seen and known of decedent's peril and that he could not escape by the exercise of ordinary care, their failure to exercise such care would be negligence, regardless of whether some time before the collision they saw decedent in a place of safety, if by the exercise of reasonable care immediately thereafter and for some appreciable time before the collision they by the exercise of ordinary care discovered or could have discovered that from a place of safety decedent had actually entered a place of danger.

Cleveland, etc., R. Co. v. Cloud, 256, 262 (3).

19. *Crossing Accidents.—Last Clear Chance.*—Where decedent was in a place where he had a right to be and was unable to remove himself, his negligence, if any, being antecedent, the defendant may be negligent under the last clear chance doctrine in not discovering his position of peril.

Cleveland, etc., R. Co. v. Cloud, 256, 266 (4).

20. *Duty to Trespassers.—Last Clear Chance.*—While a railroad company would not be liable for the death of a trespasser run down by one of its trains merely from the fact that such train was at the time being run at a speed in excess of that provided by a city ordinance, it is the duty of the engineer on discovering an object on the track ahead of his train to use reasonable care to ascertain what it is, and there may be a liability if the facts warrant an application of the doctrine of last clear chance. (*Dull v. Cleveland, etc., R. Co.* [1898], 21 Ind. App. 571, overruled.)

Watts v. Chicago, etc., R. Co., 51, 55 (5).

21. *Fencing Tracks.—Statutory Requirements.*—Under §5447 Burns 1914, Acts 1885 p. 224, requiring every railroad company to maintain fences on both sides of its railroad through the entire length thereof, where one railroad is paralleled by the adjacent track of another company, neither company is required to construct or maintain a fence between the two tracks, since a contrary construction of the statute would result in absurdity and the imposition of unnecessary burdens, in view of §5445 Burns 1914, Acts 1885 p. 148, requiring gates at farm crossings and would lend no assistance in carrying out the evident object of the statute.

Pickett v. Toledo, etc., R. Co., 26, 29 (2).

22. *Injuries to Persons on Tracks.—Last Clear Chance.—Instructions.*—In an action for the death of a person who was struck by a train under circumstances making the doctrine of last clear chance applicable, instructions, though correctly stating the general duty of defendant toward trespassers, but omitting the last clear chance rule, were erroneous.

Watts v. Chicago, etc., R. Co., 51, 55 (3).

23. *Injuries to Persons on Track.—Evidence.—Instructions.*—In an action to recover for the death of one who was run down by a train, where the question of whether decedent was on a public street at the time of receiving his injury was a controverted fact on which evidence was heard, an instruction stating that "it does not appear that decedent was upon any street or highway, or any

RAILROADS—Continued.

crossing or place where he had a right to be", was erroneous, as invading the province of the jury.

Watts v. Chicago, etc., R. Co., 51, 54 (2).

24. *Injuries to Persons on Track.—Duty to Trespassers.—Instructions.—Last Clear Chance.*—An instruction that the jury was not to consider what some other engineer might have done with the train which killed plaintiff's decedent as the railroad company owed no duty to a trespasser to man its engine with skilful engineers, that defendant was only bound by the acts of the engineer after he had discovered the decedent and appreciated his danger, and that if, after such discovery, the engineer used reasonable care and diligence to stop the train the plaintiff could not recover, was erroneous in stating that defendant owed no duty to decedent until it knew and appreciated the danger of decedent.

Watts v. Chicago, etc., R. Co., 51, 55 (4).

25. *Injuries to Persons on Premises.—Frightening Team.—Duty of Defendant.—Instructions.*—In an action for injuries to plaintiff by the operation of defendant's train so as to frighten plaintiff's team while he was unloading freight from a car, an instruction on the duty owing plaintiff while rightfully on the premises which in effect told the jury that if plaintiff was free from contributory negligence defendant was liable in damages if it ran its train so as to scare his horses, was erroneous in that it imposed liability regardless of the degree of care exercised in running the train.

Pittsburgh, etc., R. Co. v. Ellis, 172, 177 (3).

26. *Injuries to Persons on Premises.—Complaint.—Sufficiency.*—A complaint for injuries to plaintiff by the frightening of his team while unloading freight from a car on defendant's track, alleging facts to show that plaintiff was rightfully unloading defendant's car and therefore rightfully on the premises, and averring that the acts of defendant were carelessly and negligently done, was sufficient against the objection that it did not show a duty owing by defendant to the plaintiff, and did not show that a depression at the side of the approach to the track, into which plaintiff's wagon was thrown, could have been constructed differently, etc., since while rightfully on the premises and in going from there to a place of safety, defendant owed plaintiff the duty of exercising such care for his safety and protection from its moving trains as an ordinarily prudent person would exercise under like circumstances, and the averments that the acts of defendant were negligently done amounted to a charge that defendant failed to use due care and also carried with them the idea that there was a way in which such acts could have been carefully done.

Pittsburgh, etc., R. Co. v. Ellis, 172, 176 (1).

27. *Interurban.—Fencing Right of Way.—Statutes.—Contracts.*—There is no duty resting on an interurban railroad company to maintain fences along its right of way, save as imposed by §5707 Burns 1914, Acts 1903 p. 426, expressly providing that it does not change any existing contract; hence, the covenant in a conveyance made in 1901 to an interurban railroad company binding grantor to maintain a fence along defendant's right of way, precluded plaintiff, who was a tenant of one to whom such grantor conveyed the remainder of his land, from recovering damages against such railroad company for stock killed, on the theory that it was negligent in failing to keep the fence in repair.

Union Traction Co. v. Thompson, 183, 185 (2).

28. *Raising Grade.—Damages.—Evidence.*—Where the testimony of all the witnesses on the question of depreciation in value of plaintiff's property, resulting from the raising of a railroad grade, in-

RAILROADS—Continued.

cluded improper elements not separated from those which were proper, a verdict for the plaintiff could not be sustained.

Pittsburgh, etc., R. Co. v. Lamm, 389, 399 (9).

29. *Street Crossings.—Duty to Make Safe.—Conformity to Street Grade.*—Under §5250 Burns 1914, Acts 1895 p. 233, it is the duty of railroad companies to keep their crossings in a safe condition for use by the traveling public, and they may be compelled by mandate to make their tracks conform to street grades and to construct crossings over the tracks.

Morrissey v. Cleveland, etc., R. Co., 90, 98 (2).

30. *Street Crossings.—Personal Injuries.—Contributory Negligence.—Answers to Interrogatories.*—In an action against a railroad company for personal injuries to plaintiff who slipped and fell while attempting to pass over a board walk maintained by defendant over its track at a public street crossing, where the complaint charged negligence in maintaining the approach from the sidewalk to the crossing at a sharp incline and in permitting an accumulation of ice at such place, etc., a general verdict for plaintiff amounted to a finding that plaintiff was not guilty of contributory negligence in attempting to pass over such crossing, and answers by the jury to interrogatories, though showing that plaintiff had knowledge of the dangerous condition, were insufficient to sustain a judgment thereon notwithstanding the verdict, in the absence of a finding that plaintiff's attention was not diverted at the time.

Morrissey v. Cleveland, etc., R. Co., 90, 98 (3), 99 (3).

31. *Street Crossings.—Personal Injuries.—Complaint.*—A complaint against a railroad company for personal injuries, alleging that defendant was negligent in maintaining its track at an elevation above a street crossing, so that there had to be an incline in the board walk crossing the track and down to the sidewalk level, and in permitting an accumulation of ice from water and steam which escaped while engines received water from an adjacent standpipe, that such dangerous situation had existed through the winters for ten years and that defendant was advised of it and could have remedied it, but failed to do so, that plaintiff had occasion to cross the track frequently at such point, which was one of the principal streets of the city, that the plaintiff slipped on such ice and suffered severe and permanent injuries through no negligence of his own, and entirely through the negligence of defendant in so maintaining the crossing and so causing the ice to accumulate, did not show that plaintiff was guilty of negligence in attempting to cross and was sufficient.

Morrissey v. Cleveland, etc., R. Co., 90, 92 (1).

REAL ESTATE—

Interest in, see **CONTRACTS** 10, 11.

REDEMPTION—

See **HUSBAND AND WIFE** 5.

"REEXTENSION"—

See **WORDS AND PHRASES**.

RELEASE—

Fraud.—Personal Injuries.—Where plaintiff was induced to execute a release of claim for the death of her husband, killed while at work in a coal mine, by the representations of defendant's agent who took advantage of her necessitous circumstances, and represented

RELEASE—Continued.

to her that it would be six or seven years before she would acquire anything by litigation, that defendant had evidence to show that decedent had assumed the risk, and falsely underrated the ability of her attorneys and stated that their services were worth but a small sum, a reply setting up such facts, showing that plaintiff had been imposed upon, and that immediately on learning her rights she had tendered back to the defendant the check which she received for such release, etc., was sufficient to avoid an answer pleading such release as a defense.

Vandalia Coal Co. v. Alsopp, 649, 657 (2).

REMAINDERS—

See **WILLS** 4, 5, 6.

RESCISSION—

For fraud, see **CORPORATIONS** 5, 6.

REVERSAL—

See **APPEAL** 98, 99.

REVIEW—

As to evidence, see **APPEAL** 36-44.

As to instructions, see **APPEAL** 45-64.

As to pleadings, see **APPEAL** 65-73.

REVIVAL—

See **JUDGMENT**.

RIGHT—

Of appeal, see **APPEAL** 6.

RIGHT OF WAY—

Fencing, see **RAILROADS** 27.

RIPARIAN RIGHTS—

See **BOUNDARIES** 1.

RULES—

Of a trial court are construed to be the law of the court made for the orderly conduct of business and for the protection of litigants, see **COURTS** 5.

SALES—

1. *Action for Price.—Recovery of Interest.*—A verdict for the selling price of corn plus interest was not subject to the objection that the amount of recovery was too large, on the theory that interest may not be collected on an unliquidated claim, where the amount of the claim rested in mere computation, since under such circumstances the claim was not unliquidated.

Kuhn v. Powell, 131, 134 (5).

2. *Action for Price.—Recovery of Interest.—Pleading.—Failure to Demand Interest.*—In an action for the price of corn sold and delivered, a verdict for plaintiff including an award of interest will not be disturbed on appeal on the ground that interest was not demanded in the complaint, since the court will deem the complaint

SALES—Continued.

to have been amended to conform to the proof under the provisions of §700 Burns 1914, §658 R. S. 1881. *Kuhn v. Powell*, 131, 134 (6).

3. *Action for Price.—Recovery of Interest.—Demand.—Evidence.*—In an action for the purchase price of corn sold and delivered, evidence showing that following delivery plaintiff called on defendant's manager for settlement of the account, and that plaintiff on being at variance with the amount conceded by such agent to be due, insisted that payment be made according to her own figures, constituted sufficient proof of demand to entitle her to recovery of interest on the amount due. *Kuhn v. Powell*, 131, 133 (3).
4. *Breach of Warranty.—Sufficiency of Evidence.*—Where there was evidence to show that brass railings sold to be used in the equipment of automobiles were sold on information as to the use that was to be made of them, but that they were of an inferior grade and not substantial, it was sufficient, though in conflict with evidence produced by appellant, to sustain a verdict for appellant in the amount that appellee admitted that it owed.
Western Brass Mfg. Co. v. Haynes Auto Co., 524, 526 (2).
5. *Fraud.—Evidence.*—Where plaintiff, who was experienced, made a personal examination of a second-hand traction engine before purchasing same, and relied on his own judgment as to its fitness, although he also testified that defendant's agent stated that the engine would do the work if it was as good as recommended to him, and that those in charge of the engine at the time plaintiff examined it stated that it was all right and that leaking steam which plaintiff noticed was the result of a loose bolt, and the engine, after its purchase by plaintiff, leaked water and steam so as to render it useless, etc., the evidence was insufficient to warrant a finding that the sale of the engine to plaintiff was induced by fraudulent representations. *Aultman, etc., Mach. Co. v. Shell*, 19, 22 (2), 24 (2).

SETTLEMENT—

Of litigation between the parties when made in good faith are commendable and should be encouraged, see **COMPROMISE AND SETTLEMENT**.

Between parties after judgment and where plaintiffs attorney took a lien for his fee without the knowledge or consent of the attorney is a fraud and the attorney can assert and enforce his interest in the judgment regardless of the settlement, **ATTORNEY AND CLIENT 2**.

SPECIFIC PERFORMANCE—

1. *Contracts.—Denial of Remedy.*—Where an option contract for the purchase of real estate is ambiguous as to the amount to be paid in case the option is exercised, the purchaser understanding that he is to pay a certain sum and the grantor understanding that he is to receive a larger sum, there is no meeting of the minds of the parties as to a material matter, and specific performance of such contract will be denied.
Smith v. Toth, 42, 49 (5).
2. *Contracts.—Construction.—Review.*—In an action for specific performance of a contract granting an option for the purchase of real estate "at and for the sum of \$3,000 cash net" to grantor, and binding grantor to furnish abstract showing good title except as to special assessments, and to convey the real estate "free and clear of all liens whatever", the court properly heard and considered parol evidence to aid in the interpretation thereof, since the contract was ambiguous, and there being evidence to sustain the court's decision against plaintiff, the decision could neither be disturbed for insufficiency of evidence nor upon the theory that it was contrary to law.
Smith v. Toth, 42, 49 (4).

STATE—

Authority of, to sell swamp lands, see PUBLIC LANDS 5-8.

STATUTES—

See CONTRACTS 6, 7; FORCIBLE ENTRY AND DETAINER 1; HUSBAND AND WIFE 9, 14; RAILROADS 27.

Providing for the payment of alimony, see DIVORCE.

1. *Construction.—Legislative Intent.*—The prime object in the construction of statutes is to ascertain and carry out the purpose and intent of the legislature, and while the words used in a statute should first be considered in their literal and ordinary signification, the letter of the statute should not be followed where it leads to contradiction, absurdities or unjust results, and the intention as gathered from a consideration of the whole statute should control.

Pickett v. Toledo, etc., R. Co., 26, 29 (1).

2. *Ordinances.—Traffic Regulations.—Construction.*—Statutes and ordinances regulating traffic in public streets or highways should receive a reasonable construction consistent with the purpose of their enactment and the practical difficulties that arise in their application to particular cases. *Conder v. Griffith*, 218, 224 (6).

3. *Remedial Statutes.—Construction.*—In ascertaining the persons or classes that come within the provisions of a remedial statute the courts apply the rule of strict construction, but in order to give effect to the statute as to those who come within its provisions it will be liberally construed.

Tipton Realty, etc., Co. v. Kokomo Stone Co., 681, 687 (1).

STOCK—

Sale of, see CORPORATIONS 6.

STREETS—

Defective, see MUNICIPAL CORPORATIONS 2.

Duty of railroad companies to keep their crossings in a safe condition and to conform to the grade of the, see RAILROADS 29.

"SUBCONTRACTOR"—

See WORDS AND PHRASES 2.

SUBROGATION—

See HUSBAND AND WIFE 5.

Right of Surety.—Misappropriation of Trust Deposits.—An administrator's surety, which had not satisfied the demands of the estate for funds which the administrator failed to account for, could not enforce an equitable right of subrogation against a bank in which the administrator had deposited the funds and which had permitted him to check them out with knowledge that he was misapplying them. *Miami County Bank v. State, ex rel.*, 360, 372 (4).

SUPERSEDEAS—

See APPEAL 14.

A writ of, is purely statutory and ordinarily can be granted only to stay execution or proceedings in the trial court in the particular case from which the appeal is taken, see APPEAL 14.

SUPPLEMENTAL COMPLAINT—

An assignment of error in overruling a demurrer to a, presents no question for review, see APPEAL 21.

SURETY—

See **PRINCIPAL AND SURETY**.

SURVEYS—

See **BOUNDARIES 2, 3; PUBLIC LANDS 3**.

SWAMP LANDS—

See **WATERS AND WATERCOURSES 7**.

Acquisition of title of, see **PUBLIC LANDS 4-8**.

TAX SCHEDULE—

In an action on a note, where one of the issues was as to whether plaintiff was the real party in interest and there was evidence to show that plaintiff purchased the note for full value, the tax schedule of plaintiff which failed to show the listing of the note is competent evidence, see **BILLS AND NOTES 3**.

TENANCY BY ENTIRETIES—

See **HUSBAND AND WIFE 12; VENDOR AND PURCHASER 4**.

TESTATOR—

See **WILLS 3**.

TERM TIME APPEAL—

See **APPEAL 35**.

THEORY OF CASE—

Can not be changed in the Appellate Court, see **APPEAL 3**.

While a court on appeal will hold a party to the theory of the case adopted in the trial court, such theory will be determined by a consideration of the whole record, see **APPEAL 7**.

TIME—

Extending, of payment, see **INSURANCE 22**.

Extension of, for filing, see **EXCEPTIONS, BILL OF 1, 2**

For filing motion for new trial is mandatory, see **NEW TRIAL 2**.

Of taking proceedings, see **APPEAL 12, 13**.

Of paying premiums extended, see **INSURANCE 8, 9**.

The statutory limit on the, for perfecting an appeal is jurisdictional, see **APPEAL 13**.

TITLE—

To public lands, see **PUBLIC LANDS 9**.

To swamp lands, see **PUBLIC LANDS 4-8**.

Acquired, to real estate can not be defeated by mere statements as these do not operate as a conveyance, see **ADVERSE POSSESSION 1**.

Plaintiff in an action of ejectment alleging legal, to the real estate in controversy is bound thereby and can not recover on proof of an equitable title, see **EJECTMENT 1**.

Where one acquired, by adverse possession to a strip between the platted line of his lot and a fence, his subsequent agreement to move the fence to the original lot line, not having been acted on, and no money having been expended on the faith of it, did not estop him from claiming the strip, see **ADVERSE POSSESSION 2**.

TORTS—

A complaint seeking recovery *ex contractu* is inconsistent in theory with a recovery *ex delicto*, see PLEADING 6, 7.

The most liberal construction of the code will not countenance a misjoinder in which an action upon contract and one in tort are joined and in which it is sought to enforce liability on the contract against one of the parties whose liability is solely in tort, see ACTION

TRACKS—

Animals on, see RAILROADS 1.

Fencing, see RAILROADS 21.

Injuries to Persons on, see RAILROADS 22-24.

TRANSCRIPT—

See APPEAL 16-20.

Sufficiency of certificate of clerk to, see APPEAL 16.

TRESPASSERS—

Duty to, see RAILROADS 24.

TRIAL.

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| I. COURSE AND CONDUCT OF TRIAL IN GENERAL, 1, 2. | IV. INSTRUCTIONS, 8-10. |
| II. RECEPTION OF EVIDENCE, 3, 4. | V. VERDICT, 11-13. |
| III. DIRECTING VERDICT, 5-7. | VI. ANSWERS TO INTERROGATORIES. |
| | VII. FINDINGS. |

I. COURSE AND CONDUCT OF TRIAL IN GENERAL.

1. *Depositions.—Motion to Suppress.*—Where the notice for the taking of a deposition is defective, and the defect appears upon its face, objection should be taken by a motion to suppress the deposition before entering on the trial. *Voorhees v. Cragun*, 690, 702 (7).
2. *Interrogatories to Jury.*—The practice of submitting a large number of interrogatories to the jury, containing many inconsequential questions calculated to have no other effect than to confuse and mystify the jury, should not be permitted.
Southern R. Co. v. Weidenbrenner, 314, 323 (8).

II. RECEPTION OF EVIDENCE.

3. *Offer of Evidence.*—An offer of evidence to show the intoxicated condition of the driver of an automobile at the time of injury to his invited guest by collision with a train, should include an offer to make it material by showing that the guest knew of his condition, or that it was the sole proximate cause.
Pittsburgh, etc., R. Co. v. Kephert, 621, 627 (6).
4. *Evidence.—Witnesses.—Failure to Produce.—Presumptions.—Instructions.*—Where a party has the power and opportunity of producing evidence or a witness, presumably friendly to him, whose testimony would or could explain a transaction or further enlighten the court or jury, failure to produce such evidence or witness gives rise to the presumption, though rebuttable, that such evidence or the testimony of such witness would be unfavorable to the party or his contention; and, while it is proper to instruct the jury to such effect, such instructions should be carefully worded to guard the interests of the party and should only be given when it reasonably appears that he has it within his power to produce the witness or evidence and fails to do so or to make reasonable effort to that end.
Bump v. McGrannahan, 136, 145 (7).

TRIAL—Continued.**III. DIRECTING VERDICT.**

5. The direction of a verdict for defendant is not proper unless there is a total absence of evidence upon some issue or fact essential to recovery by plaintiff, or unless the evidence is without conflict and, when considered in its entirety, with all reasonable and legitimate inferences which the jury may properly draw therefrom, is susceptible of no other inference than that necessitating the directing of the verdict.

West v. National Casualty Co., 479, 483 (1).

6. *Instructions*.—The trial court should not give a peremptory instruction for defendant unless the evidence favorable to the plaintiff, and the reasonable inferences which the jury is permitted to draw therefrom, fail to support one or more of the essential averments of the complaint. *Vandalia R. Co. v. Parker*, 146, 151 (3).
7. *Peremptory Instructions*.—A peremptory instruction should be given only when there is a total absence of evidence upon an essential issue, or where the evidence is without conflict and the only inference to be drawn therefrom is favorable to the party asking the instruction. *Parker v. Hickman*, 152, 162 (9).

IV. INSTRUCTIONS.

See APPEAL 45-64, 85-88; DAMAGES 2, 4; HUSBAND AND WIFE 13, 15, 16; NEGLIGENCE 8, 9; RAILROADS 14, 17, 18, 22-25.

Contradictory, see APPEAL 51.

Refusal of, see APPEAL 57-63.

The court on appeal can not say that erroneous, are harmless in view of the jury's answers to interrogatories where it does not appear that the interrogatories would not have been differently answered had proper instructions been given, see APPEAL 48.

8. *Duty to Request*.—Where a party feels that an instruction by the court lacks certain embellishments or qualifications it is his duty to tender an instruction covering the omissions.

Elliot v. Elliot, 209, 212 (2).

9. *Peremptory Instruction*.—In considering a motion for a peremptory instruction the court should accept as true all facts which the evidence tends to prove, and draw against the one asking the instruction all reasonable inferences which the jury might properly draw, and, in case of conflict in the evidence, consider that evidence and those inferences which are favorable to the party having the burden of proof.

Colvert v. Harrington, 608, 610 (1).

10. *Requisites*.—Instructions should not only state correct principles of law but they should also be applicable to the issues and facts.

Conder v. Griffith, 218, 223 (4).

V. VERDICT.

See APPEAL 75, 80; BONDS 2; MASTER AND SERVANT 6; NEGLIGENCE 5; RAILROADS 15.

Conclusiveness of, see BILLS AND NOTES 10.

When conclusive, see APPEAL 41.

Directing verdict, see APPEAL 54-56.

There was no error in overruling the motion for new trial on the ground of insufficient evidence, see APPEAL 44.

11. *Verdict*.—*Answers to Interrogatories*.—It is the duty of the trial court to sustain a motion for judgment on the jury's answers to interrogatories where they are in irreconcilable conflict with the general verdict. *Morrissey v. Cleveland, etc., R. Co.*, 90, 99 (5).

TRIAL—Continued.

12. *Verdict.*—*Answers to Interrogatories.*—A general verdict finds every material issuable fact in favor of the prevailing party, and all reasonable presumptions will be indulged in its favor as against the jury's answers to interrogatories.

Cole Motor Car Co. v. Ludorff, 119, 123 (2).

13. *Verdict.*—*Answers to Interrogatories.*—Contradictory answers to interrogatories neutralize each other, and where the answers are contradictory, or are not irreconcilable with the general verdict by any evidence admissible under the issues, they will not sustain a motion for judgment thereon notwithstanding the general verdict.

Cole Motor Car Co. v. Ludorff, 119, 123 (3).

VI. ANSWERS TO INTERROGATORIES.

See APPEAL 48, 78-81; BONDS 2; NEGLIGENCE 5; RAILROADS 15.
Judgment on, see RAILROADS 12, 30.

VII. FINDINGS.

See APPEAL 37-39, 98; CONTRACTS 2; QUIETING TITLE 2.
Conclusiveness of, see APPEAL 76, 77.

TRUST FUNDS—

See BANKS AND BANKING 2-4.

VARIANCE—

Between pleading and proof, see APPEAL 92.

VENDOR AND PURCHASER—

1. *Vendor's Lien.*—The technical relation of vendor and vendee is not necessary to the existence of a vendor's lien.

Simmons v. Parker, 403, 415 (8).

2. *Vendor's Lien.*—*Taking of Mortgage.*—The taking of a mortgage by the vendor on property sold to husband and wife by the entirety, though invalid because signed by the husband alone and without the wife's knowledge or consent, indicated a purpose not to waive any lien growing out of the transaction, and was therefore not inconsistent with the existence of a vendor's lien.

Simmons v. Parker, 403, 415 (6).

3. *Vendor's Lien.*—*Establishment Against Lands in Hands of Wife*—Where a husband purchases land, and executes his own note for the purchase price, which note remains unpaid, and causes the land to be conveyed to his wife, who pays no consideration therefor, the wife is a mere volunteer and the vendor may establish a lien against the land; and he may also establish such lien where the wife pays the purchase price in part and the husband executes his note for the balance.

Simmons v. Parker, 403, 415 (7).

4. *Vendor's Lien.*—*Enforcement Against Tenants by Entireties.*—Where a husband and wife took title to land by the entirety, the wife being a purchaser for value, and it was distinctly understood between the parties that no indebtedness should arise against either the husband or wife on account of such transaction, except on condition that certain other property acquired should on investigation prove to be as represented by the grantor, and pending such investigation by the wife the husband alone executed a note and also a mortgage on the property held by the entirety, which he delivered to the grantor to be signed by the wife in the event the investigation proved to be satisfactory, and the condition failed by reason of such other property not being as represented, neither the husband nor the wife owed any debt and no vendor's lien arose as against the property held by the entirety.

Simmons v. Parker, 403, 416 (10).

VERDICT—

See TRIAL 11-13.

"VEHICLE"—

See WORDS AND PHRASES.

WAIVER—

See DEPOSITIONS; WITNESSES 2.

Of defects, see PLEADING 13, 14.

Of error, see APPEAL 33, 70, 93, 94.

Of provision in policy, see INSURANCE 16, 18-20.

WAREHOUSEMEN—

Liability as, see CARRIERS 3, 4.

WARRANTY—

Breach of, see SALES 4.

WATERS AND WATERCOURSES—

1. *Boundaries.—Meander Lines.*—As a general rule meander lines run in surveying fractional portions of the public lands along streams are merely for the purpose of defining the sinuosity of the banks and for ascertaining the quantity of land subject to sale, and are not to be considered as boundaries unless it appears that such was the intention of the parties to the instrument of conveyance.

State v. Tiesburg Land Co., 555, 587 (8), 588 (8).

2. *Meander Lines.—Boundaries.*—In determining whether the meander line of a stream should be regarded as a boundary beyond which a grantee may not claim title, the intention of the parties to the instrument, as gathered from the instrument itself, or if the instrument is ambiguous, as gathered in the light of facts and circumstances existing at the time the instrument was prepared, should always have an important if not a controlling influence.

State v. Tiesburg Land Co., 555, 592 (12).

3. *Obstruction.—Flooding Lands.—Liability of Railroads.*—A railroad company is under a continuing duty to maintain its bridges and abutments so as to do no injury or damage to neighboring property, and a failure in that regard resulting in the obstruction of the natural flow of the water constitutes actionable negligence.

Southern R. Co. v. Weidenbrenner, 314, 318 (2).

4. *Obstruction.—Flooding Lands.—Liability.—Unusual Conditions.*—A railroad company is not relieved from liability for negligently maintaining a bridge so as to obstruct the flow of water and cause it to back up over nearby lands, on the ground that there was an unusual rainfall, since under §5195 Burns 1914, §3903 R. S. 1881, it is the duty of the company, after building its bridge across a stream, to restore the watercourse to its former state.

Southern R. Co. v. Weidenbrenner, 314, 321 (6).

5. *Obstruction.—Railroad Bridges.*—Railroad companies are guilty of actionable negligence if they construct and maintain their bridges or embankments or trestles in such manner as to obstruct a watercourse, and are also liable if they obstruct a waterway with stones, piling or debris of any kind, or if they negligently permit drift to accumulate about their bridges or piling to the injury of adjoining property.

Southern R. Co. v. Weidenbrenner, 314, 323 (9).

6. *Railroad Bridges.—Construction.*—In the construction of a bridge across a stream, it is the duty of a railroad company to exercise at

WATERS AND WATERCOURSES—Continued.

least a reasonable degree of care and prudence, taking into consideration the laws of hydraulics, the natural formation of the country, the character of the stream and its history, so as to guard against injuries which may reasonably be anticipated.

Southern R. Co. v. Weidenbrenner, 314, 324 (10).

7. *Riparian Owners.—Boundaries.—Swamp Lands.*—A conveyance of land bounded by a nonnavigable stream carries with it the bed of the stream to the center, unless a contrary intention is manifest; but where land conveyed is described by a meander line run between such land and unsurveyed marsh or submerged land lying next to the stream, the title of the purchaser is limited to the land included within the survey.

State v. Tuesburg Land Co., 555, 581 (4).

WILLS—

1. *Construction.—Postponement of Estates.*—The postponement of estates is looked upon with disfavor; and the intent to do so must be clear and not arise from inference or construction.

Jones v. Chandler, 500, 505 (4).

2. *Construction.—Vesting of Estates.*—In case of doubt as to the intention of the testator, the estate will be deemed to have vested.

Jones v. Chandler, 500, 504 (2).

3. *Construction.—Intention of Testator.*—Where the language of a will is free from doubt, it needs no construction; but where there is doubt, the intention of the testator, as gathered from the entire will aided by the rules of law applicable to the construction of wills, must be given effect.

Jones v. Chandler, 500, 504 (1).

4. *Construction.—Remainders.—Vested or Contingent.*—Whether an estate is vested or contingent is determined by the right and capacity of the remaindermen to take possession of the estate, if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remaindermen.

Jones v. Chandler, 500, 505 (3).

5. *Construction.—Remainder.*—Under a will devising land to the daughter of a testatrix "to be held, possessed and enjoyed by her during her natural life and at her death to descend to her children, such as may be living", the testatrix intended to make a final disposition of her property, that the daughter should have a life estate, and that her grandchildren should be vested with such an estate as would descend to their heirs upon their death.

Jones v. Chandler, 500, 507 (6).

6. *Construction.—Vesting of Estates.—Remainders.*—"Postponement of Estates".—There is a distinction between the vesting of an estate and the enjoyment of a remainder, and words postponing an estate are presumed to relate to the beginning of the enjoyment and not to the vesting of such an estate, and the vesting of a remainder absolutely is preferred rather than the vesting contingently or conditionally.

Jones v. Chandler, 500, 506 (5).

7. *Provision for Widow.—Election.—Statutes.*—While a widow's acceptance of the provisions of her deceased husband's will does not in all cases preclude her from the widow's allowance of \$500 as provided for by §2786 Burns 1914, §2269 R. S. 1881, it does do so where the provisions of the will are inconsistent with her claims under the statute; hence where the will of appellant's deceased husband disposed of the whole estate and showed an intent to limit appellant's interest to the provision made for her, her election to take under the will was binding and precluded her from any right to an allowance under the statute.

Stiglitz v. Migatz, 529.

WITNESSES—

Failure to produce, see TRIAL 4.

Competency of claimants as, against estates, see EXECUTORS AND ADMINISTRATORS 2.

1. *Competency.—Conversation with Decedent.*—In an indorsee's action on a note, purchased from the estate of the payee, who was dead, under circumstances exempting the estate from liability, the defendant was competent to testify to a conversation with decedent appertaining to the sale of merchandise for which the note was given.
Bright Nat. Bank v. Hartman, 440, 452 (14).
2. *Competency.—Transactions with Deceased Persons.—Waiver.*—Where an administrator suing to recover property belonging to the estate, obtained by defendants through a conspiracy and converted by them, called, on the trial of a prior action for the same cause, a party as a witness and compelled him to testify, and also required him to answer written interrogatories, he waived the incompetency of the party to testify in the subsequent action under §526 Burns 1914, §502 R. S. 1881.
Craig v. Norwood, 104, 116 (16).
3. *Competency.—Transactions with Deceased Persons.—“Party”.*—Under §§519, 521 Burns 1914, §§496, 498 R. S. 1881, relating to the competency of witnesses, and providing that, where an administrator is a party to an action involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be rendered for or against the estate, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a witness as to such matters against such estate, the word “party” means a party to the issue and not merely a party to the record, and to be incompetent as a witness such party must have an interest adverse to the estate; so that in the absence of any showing that persons, though nominally parties, are necessary parties to the issue, or record in an administrator's action, or that they have any interest adverse to the estate, it is error to refuse to permit them to testify.
Craig v. Norwood, 104, 115 (15).

WORDS AND PHRASES—

See DAMAGES 8.

Postponement of estates, see WILLS 6.

“And” in place of “Or”, see FORCIBLE ENTRY AND DETAINER 1.

“Including” as used in the bond of a contractor, see BONDS 3.

“Party” means a party to the issue and not merely a party to the record, see WITNESSES 3.

“Reextension” as used in the statute applies to and is limited to the first extension obtained as after the extension beyond the term, see EXCEPTIONS, BILL OF 2.

1. *“Gross.”—“Net.”*—The word “gross” when used to characterize a sum of money conveys the idea of a named or indicated amount before diminution, but from which there are to be taken other sums or amounts, leaving a balance, and the word “net” suggests a balance after all deductions have been made from a larger sum.
Smith v. Toth, 42, 45 (1).

2. *“Subcontractor.”*—The term “subcontractor” does not ordinarily include materialmen and will not be held to do so unless it clearly appears from the context of the act or writing in question that it was so intended.

Tipton Realty, etc., Co. v. Kokomo Stone Co., 681, 687 (2).

3. *“Vehicle.”*—The word “vehicle” as used in statutes or ordinances regulating traffic, means any carriage or conveyance used or capable of being used as a means of transportation on land, but ordinarily does not include locomotives, cars and street cars operated over a permanent track in the absence of an intention to that effect clearly expressed.
Conder v. Griffith, 218, 223 (3).



